TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 39

DE FOREST HUBBURD, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR CERTIORARI FILED MAY 2, 1935.

CERTIORARI GRANTED JUNE 3, 1935.

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[fol. 1]

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 22028

DEFOREST HULBURD and HUGH MCBIRNEY JOHNSTON, Executors of the Estate of Chas. H. Hulburd, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appearances:

For Taxpayer: Alfred T. Carton, Esq., John E. Hughes, Esq.
For Comm'r.: A. H. Murray, Esq., R. Wilson, Esq., J. A. Lyons, Esq., A. Carnduff, Esq., J. R. Johnston, Esq.

DOCKET ENTRIES

1926

Dec. 20—Petition received and filed. Taxpayer notified.
Dec. 21—Copy of petition served on General Counsel.

1927

Feb. 19—Answer filed by General Counsel.
Mar. 24—Copy of answer served on taxpayer. General Calendar.

1928

Oct. 25—Notice of appearance of John E. Hughes as counsel for taxpayer filed.
Nov. 28—Motion for leave to file amended petition, amendment tendered, filed by taxpayer. 11/30/28 granted.
Dec. 1—Application for order to take depositions filed by taxpayer.
Dec. 6—Hearing set Jan. 16, 1929.
Dec. 5—Copy of motion served on General Counsel.
Dec. 11—Order to take depositions of Louis Bauer, et al. entered.

1929

Jan. 5—Motion for transfer to Reserve Calendar filed by taxpayer. Motion denied 1/7/29.

Jan. 5—Application under Sec. 913 for preliminary examination of transferee proceedings filed by taxpayer.

[fol. 2] Jan. 9—Depositions of Louis Bauer, et al., filed (1). Copy served by Notary.

Jan. 15—Motion for a continuance to Feb. 14, 1929 filed by General Counsel. 1/16/29 granted to 2/14/29.

Jan. 16—Hearing had before Mr. Phillips on motion to continue. Continued to Feb. 14, 1929.

Feb. 1—Answer to amended petition filed by General Counsel. Copy served 3/7/29.

Feb. 7—Application for subpoena duces tecum filed by General Counsel. (1).

Feb. 14—Subpoena issued, Norman W. Church.

Feb. 14—Subpoena issued, Norton H. Van Sicklen, Jr.

Feb. 14—Hearing had before Mr. Smith on Commissioner's motion to continue for 60 days—granted.

Feb. 14—Order of continuance to April 15, 1929 entered.

Mar. 1—Motion to place on the Chicago, Ill. Field Calendar, filed by General Counsel.

Mar. 27—Hearing set on motion April 3, 1929.

Apr. 3—Hearing had before Mr. Smith on Commissioner's motion to transfer to Circuit Calendar. Granted, hearing at Chicago.

Apr. 3—Order to transfer to Circuit Calendar for hearing at Chicago, Illinois, entered.

May 10—Transcript of hearing 4/3/29 filed.

1930

Feb. 15—Motion to vacate order placing on the Circuit Calendar and to have issue of statute of limitations before other issues, filed by taxpayer. 2/19/30 copy served on General Counsel.

Feb. 19—Hearing set March 5, 1930.

Mar. 5—Hearing had before Mr. Van Fossan, Div. 9 on petitioner's motion to limit hearing—objected to by Commissioner—granted and limited hearing granted at Washington—remaining issues to Field Calendar.

Mar. 5—Order that proceeding be placed on Calendar of April 23, 1930 at Washington on statute of limitations and to remain on Circuit Calendar for hearing at Chicago, Illinois on other issues entered.

1930

Apr. 23—Hearing had before Mr. Seawell, Div. 4 on merits. Brief due May 23, 1930.

Apr. 25—Transcript of hearing 4/23/30 filed.

May 22—Brief filed by General Counsel.

May 23—Brief filed by taxpayer.

[fol. 3] Oct. 14—Findings of fact and opinion rendered, Mr. Seawell, Div. 14. Order will be entered accordingly.

Oct. 14—Order to restore to Calendar of December 8, 1930 entered.

Oct. 29—Order vacating order of Oct. 14 restoring to Calendar of 12/8/30 and to place on Circuit Calendar in the vicinity of Chicago in connection with docket 20317 entered.

1931

Mar. 13—Application for order to take deposition filed by General Counsel.

Mar. 21—Order to take depositions of N. W. Church, entered.

Mar. 26—Order amending order of 3/21/31 by changing date to 4/15/31 entered.

Apr. 28—Depositions filed.

1932

Jan. 21—Hearing set for week beginning March 21, 1932 at Chicago, Ill.

Feb. 13—Motion for order to produce filed by General Counsel.

Feb. 18—Motion to amend answer to amended petition filed by General Counsel. Amendment to answer tendered.

Feb. 16—Order to produce certain records entered.

Feb. 27—Motion to amend answer granted.

Feb. 27—Application for subpoena duces tecum of Norman W. Church filed by General Counsel.

Feb. 27—Subpoena issued—duces tecum—N. W. Church. 3/7/32 subpoena served.

Mar. 7—Application for subpoena duces tecum (4) N. H. Van Sicklen, Sr., N. H. Van Sicklen, Jr., Alfred D. Edwards & C. F. Van Sicklen, filed by General Counsel.

Mar. 7—Subpoena issue, duces tecum (4) C. F. Van Sicklen, A. D. Edwards, N. H. Van Sicklen and N. H. Sicklen, Jr. 3/7/32 subpoenas served (3).

1932

Mar. 7—Application for subpoena duces tecum, Paysoff Tinkoff, C. P. A. & L. L. B. filed by General Counsel.

Mar. 7—Subpoena issued, duces tecum, Paysoff Tinkoff, 3/7/32 subpoena served.

Mar. 14—Application for subpoena, F. A. Thulin, filed by General Counsel.

Mar. 14—Subpoena issued, F. A. Thulin, 3/14/32 subpoena served.

[fol. 4] Mar. 14—Application for subpoena of Hulburd and Johnston filed by General Counsel.

Mar. 14—Subpoenas issued (2) Hulburd and Johnston. 3/17/32 subpoenas served (2).

Mar. 15—Applications for subpoenas of Fauntleroy, Van Nortwick and Hunter filed by General Counsel.

Mar. 15—Subpoenas issued (3) duces tecum, Hunter, Fauntleroy and Van Nortwick.

Mar. 15—Subpoenas served (2) Van Nortwick and Fauntleroy.

Mar. 17—Application for subpoena duces tecum, David Burnet, filed by taxpayer.

Mar. 18—Subpoena issued, duces tecum, David Burnet. 3/22/32 subpoena served.

Mar. 18—Applications for subpoenas, Frank Carlton and R. K. O'Hara filed by General Counsel. Subpoenas issued and served.

Mar. 25—Hearing had before Mr. Sternhagen, Div. 10, called on merits, petitioner's reply to Commissioner's amendment to answer to amended petition filed. Briefs due 4/25/32 and reply briefs 5/2/32. Called from Calendar of March 25, 1932.

Apr. 21—Motion for extension to 5/24/32 to file brief filed by General Counsel. 4/22/32 granted to both sides.

May 18—Motion for extension to 6/23/32 to file brief filed by General Counsel. 5/20/32 granted.

May 23—Motion for extension to file brief filed by taxpayer.

May 24—Motion to file briefs extended 30 days after date when transcript is filed and granted.

Jun. 15—Motion for extension of 30 days after date when transcript is filed to file brief, filed by General Counsel. 6/16/32 granted.

Dec. 13—Transcript of hearing of March 21, 1932 filed.

1933

Jan. 3—Brief filed by taxpayer.

Jan. 28—Motion for extension of time to file brief filed by General Counsel. 1/30/33 granted.

Jan. 30—Brief filed by General Counsel.

Apr. 7—Opinion rendered, J. M. Sternhagen, Div. 10. Judgment will be entered for the petitioners.

Apr. 12—Judgment entered, J. M. Sternhagen, Div. 10.

Jul. 7—Petition for review by U. S. Circuit Court of Appeals (7) with assignments of error filed by General Counsel.

Jul. 14—Proof of service filed by General Counsel. (2).

[fol. 5] Sep. 2—Motion for extension to 10/5/33 to complete record filed by General Counsel,

Sep. 5—Order enlarging time to Oct. 5, 1933 for preparation of evidence and delivery of record entered.

Sep. 8—Statement of evidence lodged.

Sep. 8—Proof of service filed.

Sep. 8—Præcipe filed filed—proof of service thereon.

Sep. 27—Agreed statement of evidence approved and ordered filed.

Oct. 2—Order entered extending time for transmission of record to October 14, 1932.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PETITION—Filed Dec. 20, 1926

The above named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue, in his notice of deficiency (IT:E:RR: 280-60D), dated October 27, 1926 to Estate of Charles H. Hulburd. The petitioners as a basis for their proceeding make the following allegations, those contained in paragraphs 4 and 5 being made upon information and belief:

1. The petitioners are the persons appointed executors in the will of Charles H. Hulburd, late of Chicago, Cook County, Illinois, deceased, and Letters Testamentary were issued to them by the Probate Court of Cook County, Illinois, February 20, 1924. (The Petitioner DeForest Hul-

burd individually, the petitioner Hugh McBirney Johnston as trustee under said will, and the petitioners DeForest Hulburd and Hugh McBirney Johnston as trustees under said will also are and comprise all the legatees and devisees under said will except the beneficiaries of the trust estates created under said will, which trust estates are held by said Hugh McBirney Johnston, as such trustee and said DeForest Hulburd and Hugh McBirney Johnston, as such [fol. 6] trustees, respectively). The residence of the petitioner DeForest Hulburd is Lake Forest, Illinois. The residence of the petitioner Hugh McBirney Johnston is 1425 North State Street, Chicago, Illinois.

2. The notice of deficiency (a copy of which is attached and marked Exhibit "A") was mailed to Estate of Charles H. Hulburd on October 27, 1926.

3. The taxes in controversy are income and profit taxes for the fiscal year ended September 30, 1919. The Commissioner proposes to assess Estate of Charles H. Hulburd as a transferee of the assets of the Van Sicklen Company, Elgin, Illinois, in the amount of $24,000.00.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) The Commissioner erred in determining that a gain resulted to the Van Sicklen Company by reason of the receipt by it for distribution among its stockholders, of no par value stock of the Van Sicklen Speedometer Company.

(b) The Commissioner erred in determining that such no par value stock had a fair market value of $30.00 per share.

(c) The Commissioner erred in proposing to assess Estate of Charles H. Hulburd as a transferee of the property of Van Sicklen Company.

(d) The Commissioner erred in proposing to assess Estate of Charles H. Hulburd because the period of limitation for assessment against Estate of Charles H. Hulburd had expired.

(e) The Commissioner erred in proposing to assess Estate of Charles H. Hulburd, because no property of the Van Sicklen Company was at any time a part of or included in

Estate of Charles H. Hulburd, or was possessed by said Charles H. Hulburd at the time of his death, or was transferred to or received by your petitioners as such executors.

(f) The Commissioner erred in proposing to assess Estate of Charles H. Hulburd, because said estate has been wholly distributed and settled and your petitioners duly discharged as executors thereof.

(g) The Commissioner erred in proposing to assess Estate of Charles H. Hulburd, because said estate is not liable in law or equity in respect of said tax.

(h) The Commissioner erred in adding the sum of $49,653.30 penalty to the amount of the deficiency alleged to be due from the Van Sicklen Company.

(i) The Commissioner erred in proposing to assess Es- [fol. 7] tate of Charles H. Hulburd and the various former stockholders of the Van Sicklen Company for amounts which aggregate more than the total amount claimed to be due from the Van Sicklen Company.

(j) The Commissioner erred in proposing to assess and collect from Estate of Charles H. Hulburd a sum representing tax claimed to be due, plus a penalty, because there is no liability either at law or in equity on the part of Estate of Charles H. Hulburd for alleged false and fraudulent statement with intent to evade the tax, made by the Van Sicklen Company, and neither said Estate of Charles H. Hulburd, nor the petitioners at any time had any knowledge of any such alleged false and fraudulent statements on the part of said corporation.

5. The facts upon which the petitioners rely as the basis of this proceeding are as follows:

(a) Estate of Charles H. Hulburd was wholly distributed by the petitioners as executors of the will of Charles H. Hulburd (a copy of which is attached and marked Exhibit "B") prior to February 26, 1926 on which day the Estate of Charles H. Hulburd was declared settled and the petitioners discharged as such executors by the order of the Probate Court of Cook County, Illinois, (a copy of which is attached and marked Exhibit "C").

(b) On or about April 16, 1924, the petitioners as such executors and pursuant to the provisions of section 250 (d)

of the Revenue Act of 1921 in writing requested the Commissioner of Internal Revenue to determine and assess within one year all taxes due on the income received during the lifetime of said decedent. A copy of said written request is attached and marked Exhibit "D". Under date of April 20, 1925, (IT:PA:1; FMA 106) the Commissioner notified the petitioners, as such executors, referring to said written request of April 16, 1924, that, since the Revenue Act of 1924 was then in effect, the case had been closed under Section 277 (a) (3) of that Act. All deficiencies in tax mentioned in said notice of April 20, 1925 have been paid in full and discharged. A copy of said notice of April 20, 1925 is attached and marked Exhibit "E".

(c) The Van Sicklen Company, the taxpayer corporation, was organized October 31, 1913, under the laws of the State of Illinois, and was engaged in the manufacture of speed recording and other devices. It commenced business with an authorized capital stock of $150,000 of which $90,000 par value was paid for in property and remainder [fol. 8] in cash. On May 6, 1915 the authorized capital stock was increased to $250,000 the additional $100,000 par value being subscribed and paid for in cash.

The Company had operated at a loss and it became necessary to reorganize the Company. The total deficit for the years of its operation was $93,568.95. A plan was perfected under which the entire assets of the old company were to be transferred to a new company, in return for 5,000 shares of no par value capital stock in the new company and $250,000 in cash, which stock and cash were in turn to be divided among the stockholders of the old company. Each stockholder of the old company having a share of capital stock of $100 par value, received two shares of stock without par value in the new company. As a part of the plan of reorganization, the old corporation passed out of existence and was dissolved.

The new corporation was called the Van Sicklen Speedometer Company and was incorporated July 25, 1919, under the laws of the State of Delaware with an authorized capital of 25,000 shares of no par value common stock. The ten shares of stock subscribed for by the incorporators were paid for in cash at $100 per share.

On August 4, 1919, Chester H. Braselton, one of the reorganizers of the Van Sicklen Company, acting as trustee,

subscribed for 3500 shares of no par value capital stock of the Van Sicklen Speedometer Company and paid therefor in cash, the sum of $350,000 of which $250,000 was used to meet the cash payment above referred to.

Norman W. Church subscribed for 1,000 shares of stock in the new company, giving his note of $100,000 in payment therefor and an additional 2500 shares in the new company were issued to Mr. Church in consideration of his transferring to it, an option on the assets of the old company.

On August 9, 1919, the Van Sicklen Speedometer Company exercised the option to purchase the Van Sicklen Company assets and to assume all liability and paid therefor the sum of $250,000 in cash and 5,000 shares of its no par value common stock. On August 9, 1919, 12010 shares of stock in the new company had been issued.

On or about August 9, 1919, the capital stock of the Van Sicklen Speedometer Company had not been offered to the public in any manner whatsoever; had not been listed on any exchange; had not been bought or sold under private sale and the only purchasers of the stock were those who [fol. 9] had purchased as subscribers, for the purpose of furnishing capital to the new company.

The 5,000 shares of no par value common stock of the Van Sicklen Speedometer Company which were received by the Van Sicklen Company for the purpose of distributing the same to its stockholders, had no fair market value on August 9, 1919.

The return filed by the taxpayer corporation was made in good faith and contained no false or fraudulent statements, with intent to evade the tax.

(d) No property of the Van Sicklen Company that may have been distributed to Charles H. Hulburd, as a stockholder thereof, was possessed by said Charles H. Hulburd at the time of his death, or was transferred to or received by your petitioners as such executors, or was at any time a part of or included in the Estate of Charles H. Hulburd, deceased.

Wherefore, petitioners pray that this Board may hear the proceeding; and that the proposal of the Commissioner to assess Estate of Charles H. Hulburd in the sum of $24,000.00 be dismissed, or in the alternative that the tax deficiency of the Van Sicklen Company be redetermined

on the basis that no taxable gain resulted by reason of the receipt of 5,000 shares of no par value common stock in Van Sicklen Speedometer Company; and that the penalty be eliminated; and that petitioners may have such other and further relief as may be just; and your petitioners, as executors and trustees as aforesaid, submit their rights and interests in the matter of the taxes and penalties in controversy to the tender consideration and protection of this Board.

Henry A. Gardner, Alfred T. Carton, Counsel for Petitioners. 1030 First National Bank Building, Chicago, Illinois.

Duly sworn to by DeForest Hulburd and Hugh Johnston. Jurat omitted in printing.

[fol. 10] BEFORE U. S. BOARD OF TAX APPEALS

AMENDED PETITION—Filed Nov. 30, 1928

The above named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue, in his notice of deficiency (IT:E:RR: 280-60D), dated October 27, 1926 to Estate of Charles H. Hulburd. The petitioners as a basis for their proceeding make the following allegations, those contained in paragraphs 4 and 5 being made upon information and belief:

1. The petitioners are the persons appointed executors in the will of Charles H. Hulburd, late of Chicago, Cook County, Illinois, deceased, and Letters Testamentary were issued to them by the Probate Court of Cook County, Illinois, February 20, 1924. (The Petitioner DeForest Hulburd individually, the petitioner Hugh McBirney Johnston as trustee under said will, and the petitioners DeForest Hulburd and Hugh McBirney Johnston as trustees under said will also are and comprise all the legatees and devisees under said will except the beneficiaries of the trust estates created under said will, which trust estates are held by said Hugh McBirney Johnston, as such trustee and said DeForest Hulburd and Hugh McBirney Johnston, as such trustees, respectively.) The residence of the petitioner DeForest Hulburd is Lake Forest, Illinois. The residence

of the petitioner Hugh McBirney Johnston is 1425 North State Street, Chicago, Illinois.

2. The notice of deficiency (a copy of which is attached and marked Exhibit "A") was mailed to Estate of Charles H. Hulburd on October 27, 1926.

4. The taxes in controversy are income and profits taxes [fol. 11] for the fiscal year ended September 30, 1919. The Commissioner proposes to assess Estate of Charles H. Hulburd as a transferee of the assets of the Van Sicklen Company, Elgin, Illinois, in the amount of $24,000.00.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) The Commissioner erred in determining that a gain resulted to the Van Sicklen Company by reason of the receipt by it for distribution among its stockholders, of no par value stock of the Van Sicklen Speedometer Company.

(b) The Commissioner erred in determining that such no par value stock had a fair market value of $30.00 per share.

(c) The Commissioner erred in proposing to assess Estate of Charles H. Hulburd as a transferee of the property of Van Sicklen Company.

(d) The Commissioner erred in proposing to assess Estate of Charles H. Hulburd because the period of limitation for assessment against Estate of Charles H. Hulburd had expired.

(e) The Commissioner erred in proposing to assess Estate of Charles H. Hulburd, because no property of the Van Sicklen Company was at any time a part of or included in Estate of Charles H. Hulburd, or was possessed by said Charles H. Hulburd at the time of his death, or was transferred to or received by your petitioners as such executors.

(f) The Commissioner erred in proposing to assess Estate of Charles H. Hulburd, because said estate has been wholly distributed and settled and your petitioners duly discharged as executors thereof.

(g) The Commissioner erred in proposing to assess Estate of Charles H. Hulburd, because said estate is not liable in law or equity in respect of said tax.

(h) The Commissioner erred in adding the sum of $49,633.30 penalty to the amount of the defciency alleged to be due from the Van Sicklen Company.

(i) The Commissioner erred in proposing to assess Estate of Charles H. Hulburd and the various former stockholders of the Van Sicklen Company for amounts which aggregate more than the total amount claimed to be due from the Van Sicklen Company.

(j) The Commissioner erred in proposing to assess and collect from Estate of Charles H. Hulburd a sum representing tax claimed to be due, plus a penalty, because there is no liability either at law or in equity on the part of Estate [fol. 12] of Charles H. Hulburd for alleged false and fraudulent statement with intent to evade the tax, made by the Van Sicklen Company, and neither said Estate of Charles H. Hulburd, nor the petitioners at any time had any knowledge of any such alleged false and fraudulent statements on the part of said corporation.

(k) The Commissioner erred in holding that Charles H. Hulburd received assets of the Van Sicklen Company, in the amount of the fair market value of $24,000.00.

(l) The Commissioner erred in failing to hold that the Statute of Limitations bars any assessment against the petitioners.

5. The facts upon which the petitioners rely as the basis of this proceeding are as follows:

(a) Estate of Charles H. Hulburd was wholly distributed by the petitioners as executors of the will of Charles H. Hulburd (a copy of which is attached and marked Exhibit "B") prior to February 26, 1926 on which day the Estate of Charles H. Hulburd was declared settled and the petitioners discharged as such executors by the order of the Probate Court of Cook County, Illinois; (a copy of which is attached and marked Exhibit "C").

(b) On or about April 16, 1924, the petitioners as such executors and pursuant to the provisions of section 250 (d) of the Revenue Act of 1921 in writing requested the Commissioner of Internal Revenue to determine and assess within one year all taxes due on the income received during the lifetime of said decedent. A copy of said written re-

quest is attached and marked Exhibit "D". Under date of April 20, 1925 (IT:PA:1; FMA 106), the Commissioner notified the petitioners, as such executors, referring to said written request of April 16, 1924, that, since the Revenue Act of 1924 was then in effect, the case had been closed under Section 277 (a) (3) of that Act. All deficiencies in tax mentioned in said notice of April 20, 1925 have been paid in full and discharged. A copy of said notice of April 20, 1925 is attached and marked Exhibit "E".

(c) The Van Sicklen Company, the taxpayer corporation, was organized October 31, 1913, under the laws of the State of Illinois, and was engaged in the manufacture of speed recording and other devices. It commenced business with an authorized capital stock of $150,000 of which $90,000 par value was paid for in property and remainder in cash. On May 6, 1915 the authorized capital stock was increased to $250,000 the additional $100,000 par value being subscribed and paid for in cash.

[fol. 13] The Company had operated at a loss and it became necessary to reorganize the Company. The total deficit for the years of its operation was $93,568.95. A plan was perfected under which the entire assets of the old company were to be transferred to a new company, in return for 5,000 shares of no par value capital stock in the new company and $250,000 in cash, which stock and cash were in turn to be divided among the stockholders of the old company. Each stockholder of the old company having a share of capital stock of $100 par value, received two shares of stock without par value in the new company. As a part of the plan of reorganization, the old corporation passed out of existence and was dissolved.

The new corporation was called the Van Sicklen Speedometer Company and was incorporated July 25, 1919, under the laws of the State of Delaware with an authorized capital of 25,000 shares of no par value common stock. The ten shares of stock subscribed for by the incorporators were paid for in cash at $100 per share.

On August 4, 1919, Chester H. Braselton, one of the reorganizers of the Van Sicklen Company, acting as trustee, subscribed for 3500 shares of no par value capital stock of the Van Sicklen Speedometer Company and paid therefor in cash, the sum of $350,000 of which $250,000 was used to meet the cash payment above referred to.

Norman W. Church subscribed for 1,000 shares of stock in the new company, giving his note of $100,000 in payment therefor and an additional 2500 shares in the new company were issued to Mr. Church in consideration of his transferring to it, an option on the assets of the old company.

On August 9, 1919, the Van Sicklen Speedometer Company exercised the option to purchase the Van Sicklen Company assets and to assume all liability and paid therefore the sum of $250,000 in cash and 5,000 shares of its no par value common stock. On August 9, 1919, 12,010 shares of stock in the new company had been issued.

On or about August 9, 1919, the capital stock of the Van Sicklen Speedometer Company had not been offered to the public in any manner whatsoever; had not been listed on any exchange; had not been bought or sold under private sale and the only purchasers of the stock were those who had purchased as subscribers, for the purpose of furnishing capital to the new company.

The 5,000 shares of no par value common stock of the Van Sicklen Speedometer Company which were received by [fol. 14] the Van Sicklen Company for the purpose of Distributing the same to its stockholders, had no fair market value on August 9, 1919.

The return filed by the taxpayer corporation was made in good faith and contained no false or fraudulent statements, with intent to evade the tax.

(d) No property of the Van Sicklen Company that may have been distributed to Charles H. Hulburd, as a stockholder thereof, was possessed by said Charles H. Hulburd at the time of his death, or was transferred to or received by your petitioners as such executors, or was at any time a part of or included in the Estate of Charles H. Hulburd, deceased.

(e) Charles H. Hulburd was not the transferee of property of the Van Sicklen Company of the fair market value of $24,000.00.

(f) The Statute of Limitations bars any assessment against the petitioners for the reason that the alleged deficiency letter does not extend the Statute of Limitations. The said 60-day letter, a true copy of which is annexed hereto is addressed to "Estate of Charles H. Hulburd", there is no entity in law or equity of that name and hence

petitioners submit to this honorable Board whether the said 60-day letter has conferred jurisdiction on this honorable Board and has extended the Statute of Limitations for assessment against these petitioners.

Wherefore, petitioners pray that this Board may hear the proceeding; and that the proposal of the Commissioner to assess Estate of Charles H. Hulburd in the sum of $24,000.00 be dismissed, or in the alternative that the tax deficiency of the Van Sicklen Company be redetermined on the basis that no taxable gain resulted by reason of the receipt of 5,000 shares of no par value common stock in Van Sicklen Speedometer Company; and that the penalty be eliminated; and that petitioners may have such other and further relief as may be just; and your petitioners, as executors and trustees as aforesaid, submit their rights and interests in the matter of the taxes and penalties in controversy to the tended consideration and protection of this Board.

(Sgd.) John E. Hughes, (Sgd.) Alfred T. Carton,
(Sgd.) Henry A. Gardner, Counsel for Petitioners.
1030 First National Bank Building, Chicago, Illinois.

[fol. 15] *Duly sworn to by DeForest Hulburd. Jurat omitted in printing.*

EXHIBIT "A" TO AMENDED PETITION

Form NP-2

Office of Commissioner of Internal Revenue, Treasury Department, Washington

October 27, 1926.

IT:E:RR:280-60D
JSR.

Estate of Charles H. Hulburd,
c/oor DeForest Hulburd,
86 East Randolph Street, Chicago, Illinois.

SIRS:

As provided by Section 280 of the Revenue Act of 1926, there is proposed for assessment against the estate the sum of $24,000.00 constituting its liability as a transferee

of the assets of the Van Sicklen Company, Elgin, Illinois, representing unpaid income and profits taxes assessed against the company for the fiscal year ended September 30, 1919, in accordance with the attached statement, plus any penalty and accrued interest.

In accordance with the provisions of Section 274 of the [fol. 16] Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the inclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully,
D. H. Blair, Commissioner, By (signed) C. D. Nash,
Assistant to the Commissioner.

Inclosures: statement. Form A.

Statement.

IT:E:RR:-280
JSR:60D

Income.

Net income as determined by Revenue Agent's report dated September 24, 1924		$441,532.19
Add: Error of $5,244.75 made by Revenue Agent, due to reserve for bad debts		5,244.75
Total		$446,776.94
[fol. 17] Less: Value of 5,000 shares of no par value of The Van Sicklen Speedometer Company, determined by Revenue Agent	$321,700.	
Value of $5,000 shares of stock at $30 per share	150,000.	
		171,700.00
Net income adjusted		$275,076.94

Invested Capital.

Capital stock, $215,000.00 effective for 360/365	246,575.34

After careful consideration of the information submitted, your corporation has been allowed assessment under Sections 327 and 328 of the Revenue Act of 1918 for the period ended September 30, 1919.

Computation of Tax.

Profit tax, Section 328, 1918 rates	$142,018.41
Profit tax, Section 328, 1919 rates	60,410.20

Summary of Taxes.

That proportion of the profits tax computed at the 1918 rates, which the number of months in 1918 is of the months in the period—92/360 of $142,018.41.			$36,293.59
That proportion of the profits tax computed at the 1919 rates, which the number of months in 1919 is of the months in the period—268/360 of $60,410.20			44,972.04
Total excess and war profits tax			$81,265.63
[fol. 18] Brought forward			$81,265.63
Net Income		$275.076.94	
Less: Profits tax	$81,265.63		
Exemption	2,000.00	83,265.63	
Balance subject to tax at 12% and 10%		$191,811.31	
Amount of tax at 12%		23,017.36	
Amount of tax at 10%		19,181.13	
That proportion of the tax computed at 12%, which the number of months in 1918 is of the months in the period—92/360 of $23,017.36			5,882.22
			$87,147.85
That portion of the tax computed at 10% which the number of months in 1919 is of the months in the period 268/360 of $19,181.13			14,279.81
Correct tax liability			$101,427.66
Penalty as provided in Section 250(b) of the Revenue Act of 1918			49,653.30
Total tax plus penalty			$151,080.96
Previously assessed:			
Deficiency			$227,872.06
Penalty			113,936.03
Original tax #400201			2,121.06
			$343,929.15

Correct tax liability and penalty as shown above	$151,080.96
Overassessment	$192,848.19
Correct deficiency in tax	$101,427.66
Correct penalty	49,653.30
Total	$151,080.96
Less: Tax assessed on return #400201	2,121.06
Deficiency in tax plus penalty	$148,959.90

[fol. 19] EXHIBIT "B" TO AMENDED PETITION

Last Will and Testament of Charles H. Hulburd

I, Charles H. Hulburd, of the City of Chicago, County of Cook and State of Illinois, being of sound and disposing mind and memory, do hereby make, publish and declare this to be my Last Will and Testament, hereby revoking and annulling any and all former wills by me made.

First: I direct my Executors, hereinafter named, to pay, as soon after my decease as practicable, out of my general estate, all my just debts and funeral expenses and all inheritance taxes, socalled, upon my estate and upon each and every bequest of this, my Will.

Second: I give, devise and bequeath unto my son, De Forest Hulburd, the following described premises, in the City of Chicago, County of Cook and State of Illinois, to-wit:

That part of Lot twentynine (29) in the Subdivision of the South Half (S.½), excepting the West (W) One Hundred Thirtytwo and fivetenths (132.5) feet of said Sourh Half (S½) of Original Block One (1) in Canal Trustees' Suddivision of the South (S) fractional Quarter (¼) of Section Three (3) in Township Thirtynine (39) North Range Fourteen (14) East of the Third Principal Meridian, as shown upon a corrected plat of the Subdivision aforesaid by George P. A. Healy, which was recorded in Book 18 of Plats, page 28, described as follows:

Commencing at the Northeast (NE) corner of said Lot on the West (W) line of Lake Shore Drive; thence Southeast-

erly (SE'ly) along said West (W) line of said Lake Shore Drive, Thirtyseven and eight tenths (37.8) feet; thence West (W) on a line parallel to the North (N) line of said Lot to a point Twelve (12) feet East (E) of the East (E) line of Lot Twentyeight (28) in said Subdivision; thence North (N) on a line parallel with the West (W) line of said Lot Twentynine (29) to the North (N) line of said Lot Twentynine (29); thence East (E) on the North (N) line of said Lot Twentynine (29), One Hundred Fourteen (114) feet, more or less, to the place of beginning.

Commencing on the East (E) line of said Lot Twentynine (29) Thirtyseven and eight tenths (37.8) feet Southeast [fol. 20] (SE) of the Northeast (NE) corner thereof measured along the West (W) line of Lake Shore Drive; thence West (W) on a line parallel to the North (N) line of said Lot to a point Twelve (12) feet East (E) of the East (E) line of Lot Twentyeight (28) in said Subdivision; thence North (N) One (1) foot more or less, to the Southeast (SE) Corner of a tract of land conveyed to the City of Chicago for public alley purposes by Julian W. Mack and wife by deed, dated June 4, 1901; thence West (W) Twelve (12) feet along the South (S) line of said tract of land so conveyed to the City of Chicago to the East (E) line of said Lot Twentyeight (28); thence South (S) on the East (E) line of said Lot Twentyeight (28) to the point of intersection of said Lot Twentyeight (28) by the North (N) line of the South (S) Fortynine (49) feet, measured on the Lake Shore Drive, of said Lot Twentynine (29); thence East (E) on the North (N) line of said South (S) Fortynine (49) feet, so measured, of said Lot Twentynine (29) to a point on the West (W) line of the Lake Shore Drive Fortynine (49) feet Northwesterly (NW'ly) of the Southeast (SE) corner of said Lot Twentynine (29); thence Northerly (N'ly) along the West (W) line of said Lake Shore Drive to the place of beginning.

Said premises being all the real estate owned by me on Lake Shore Drive, known as Number 1138 Lake Shore Drive, and occupied by me as a homestead.

together with all and singular the buildings, improvements, household goods and all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, for his sole use and benefit absolutely.

Third: I give and bequeath unto my said son, De Forest Hulburd, all the jewelry, wearing apparel, personal effects and automobiles which I may possess at the time of my death.

Fourth: I give and bequeath all the stock of Union Special Machine Company of which I may die possessed to my son-in-law, Hugh McBirney Johnston, and to his successor and successors, in trust, to hold the same upon the following trusts, that is to say:

(a) In each year until the youngest of the children of my daughter, Ethel Hulburd Johnston, viz., Hulburd Johnston, Mary Elizabeth Johnston, Hugh McBirney Johnston, Jr., and Ethel De Forest Johnston, shall reach the age of twentyone (21) years, my said Trustee shall use the annual net income of the trust estate for the benefit of said [fol. 21] children or the survivor thereof, in equal shares, expending so much of each child's share for his or her education, support and maintenance during minority, as my Trustee, in his discretion, may deem necessary or proper, and paying to each child, in convenient installments, in each year after he or she shall reach his or her majority, his or her share of such net annual income. If any child shall die prior to the time for distribution of said trust estate as hereinafter provided, leaving issue him or her surviving, I direct that my Trustee shall use the share of such deceased child for the benefit of the issue of said deceased child.

(b) When the youngest of said children, or the survivors thereof, shall reach the age of twenty-one (21) years, my Trustee shall divide the trust estate, with any and all income therefrom, accrued but unpaid, and with all accumulations thereto of every kind and nature, into as many equal share as there may be children surviving and deceased children leaving issue him or her surviving. My Trustee shall convey and transfer one such share to each child then surviving, and one share to the issue of any such deceased child, it being my intention that the issue of any deceased child shall receive the share of his or her or their deceased parent, in equal shares.

Fifth: I give, devise and bequeath one half of the rest, residue and remainder of my estate, of whatever kind and

nature and wherever situated to my son, De Forest Hulburd. If my said son shall not be living at the time of my death, I give, devise and bequeath said one half of the rest, residue and remainder of my estate to John Gillies, of Chicago, Illinois, and to his successor and successors, in trust, to hold the same upon the following trusts, that is to say:

(a) To pay the income of said trust estate each year, in convenient installments, to the widow of my said son, De Forest Hulburd, as long as she shall live and shall remain unmarried. Upon her death or remarriage, my Trustee shall divide said trust estate into as many equal shares as there may be surviving children, and deceased children leaving issue him or her then surviving, of my said son, DeForest Hulburd, and shall transfer and convey to each surviving child one such share, and to the issue of each deceased child one such share of said trust estate, it being my intention that the issue of each deceased child shall take the share of his or her or their deceased parent in equal shares. If at the time of the death or remarriage of the widow of my [fol. 22] said son there shall be no children of his and no issue of any deceased child of his then living, my Trustee shall divide such trust estate into as many partes as there may be such surviving children and deceased children leaving issue him or her then surviving, of my daughter, Ethel Hulburd Johnston, and shall transfer and convey to each surviving child one such share and to the issue of each deceased child one such share of said trust estate, it being my intention that the issue of each deceased child shall take the share of his or her or their deceased parent in equal shares.

Sixth: I give, devise and bequeath the remaining one-half of the rest, residue and remainder of my estate, of whatever kind and nature and wherever situated, to my son-in-law, Hugh McBirney Johnston, and my son, De Forest Hulburd, and to their successor and successors, in trust, to hold the same upon the following trusts, that is to say:

(a) In each year until the youngest of the children of my daughter, Ethel Hulburd Johnston, viz., Hulburd Johnston, Mary Elizabeth Johnston, Hugh McBirney Johnston, Jr., and Ethel De Forest Johnston, shall reach the age of twenty-one (21) years, my said Trustees shall use the annual net income of the trust estate for the benefit of said

children or the survivors thereof, in equal shares, expending so much of each child's share for his or her education, support and maintenance during minority, as my Trustees, in their discretion, may deem necessary or proper, and paying to each child, in convenient installments in each year after he or she shall reach his or her majority, his or her share of such net annual income. If any child shall die prior to the time for distribution of said trust estate as hereinafter provided, leaving issue him or her surviving, I direct that my Trustees shall use the share of such deceased child for the benefit of the issue of said deceased child.

(b) When the youngest of said children, or the survivors thereof, shall reach the age of twenty-one (21) years, my Trustees shall divide the trust estate, with any and all income therefrom, accrued but unpaid, and with all accumulations thereto of every kind and nature, into as many equal shares as there may be children surviving and deceased children leaving issue him or her surviving. My Trustees shall convey and transfer one such share to each child then surviving, and one share to the issue of any such deceased child, it being my intention that the issue of any such deceased child shall receive the share of his or her or their deceased parent.

[fol. 23] Seventh: My Trustees named in Paragraphs Fourth, Fifth and Sixth hereof shall invest and reinvest the several trust estate and from time to time change any such investments in such manner as they shall deem best, hereby being authorized either to keep the same investments which I shall have at the time of my death or to change them or any of them in any manner in their own sole discretion, and to invest any and all of said trust estates in any real estate, stocks, bonds, mortgages or other securities or property which my said Trustees may deem safe and proper, having regard for the safety of the principal of said investments, regardless of any restrictions imposed upon the investment of trust funds by the statutes of the state of Illinois or any other state in force at the date of my death or at any time thereafter. I hereby give my said Trustees the entire management and control of said several trust estates with full power and authority from time to time to vary the securities and property in which said trust estates may from time to time be invested, and at any time or times to purchase real estate or other

property in the State of Illinois or elsewhere, and to improve in any way, to sell, exchange, lease for any length of time, convey or in any other way dispose of the whole or any portion or portions of the real estate or other property which may at any time be part of the said trust estates or any interest therein on such terms and for such prices as said Trustees may deem best, and for the above purpose to make, execute and deliver any and all contracts, deeds, mortgages, assignments, bills of sale or other instruments necessary or desirable therefor, hereby giving to my Trustees as full and complete power of management and control of the trust property and of the disposition thereof as I would or might have had if I had remained living, Purchasers from the Trustees shall not be required to see to the application of the purchase money and persons dealing with the Trustees shall not be required to see that the terms of this trust are complied with.

Eighth: In the event of the death, resignation, refusal or inability to act of Hugh McBirney Johnston as Trustee under Paragraph Fourth hereof, then and in that event, I hereby nominate and appoint John Gillies as Trustee under said Paragraph Fourth, hereby giving to said John Gillies all the same rights, powers and authority discretionary or otherwise, herein given to the Trustee therein named. And in the event of the death, resignation, refusal or inability [fol. 24] to act of both Hugh McBirney Johnston and DeForest Hulburd as Trustees under Paragraph Sixth hereof, then and in that event, I hereby nominate and appoint John Gillies as Trustee under said Paragraph Sixth, hereby giving to said John Gillies all the same rights, powers and authority, discretionary or otherwise, herein given to the Trustees therein named.

Ninth: I hereby nominate and appoint Hugh McBirney Johnston and DeForest Hulburd as Executors of this, my Will, and direct that they shall not be required to furnish sureties on their bonds as such Executors, I hereby give to my said Executors, or such of them as shall qualify, full right, power and authority to sell, mortgage, exchange or otherwise dispose of any or all of my property, real, personal or mixed, and wheresoever situate, at such time or times for such prices and on such terms as to my said Executors, or such of them as so qualify seem best, and for

any of said purposes to make, execute and deliver any and all deeds, bills of sale, mortgages or other instruments necessary or desirable therefor, and the purchaser or purchasers shall not be required to see to the application of the purchase money.

In case of the death, refusal or inability to act of both of said Executors herein named, I hereby nominate and appoint John Gillies Executor of this, my Last Will and Testament, with the same rights, powers and authority as herein given to the Executors hereinabove named.

In Witness Whereof, I have hereunto set my hand and seal to this, my Last Will and Testament, and signed my name on the margin of each of the eight (8) preceding pages, this Ninth day of September, A. D. 1921.

Charles H. Hulburd (Seal)

The above and foregoing instrument was signed, sealed, published and declared by the Testator, Charles H. Hulburd, as and for his Last Will and Testament in the presence of us, the undersigned, who, in his presence and in the presence of each other, have, at his request, hereunto subscribed our names as witnesses thereto, and have seen him sign his name on the margin of each page except this last page, this 9th day of September, A. D. 1921.

Henry A. Gardner, residing at Winnetka.
Page D. Ballard, residing at Evanston, Ills.
Robert E. Montgomery, residing at Villa Park, Ills.

[fol. 25]

A Codicil

To the Last Will and Testament of

Charles H. Hulburd

I, Charles H. Hulburd, of Chicago, Cook County, Illinois, declare the following to be a Codicil to my Last Will and Testament which bears date the 9th day September, A. D. 1921:

First: Wherever in my said Will (and particularly in Paragraphs Fifth, Eight, and Ninth thereof) I have named and/or appointed John Gillies, late of Chicago, Illinois, deceased, as a Trustee under, or an Executor of, my said Will, I hereby nominate and appoint The Northern Trust Company, a corporation organized under the laws of the State

of Illinois, and located at Chicago, Illinois, its successor and successors, as a Trustee under, or an Executor of, my said Will, as the case may be, in place of the said John Gillies, deceased; hereby giving, devising and bequeathing unto said The Northern Trust Company, and its successor and successors, as such Trustee, all the right, title, interest and estate given, devised and bequeathed in and by said will unto said John Gillies, his successor and successors, or necessary for the execution of the several trust; and hereby giving unto said The Northern Trust Company, as such Trustee or Executor, as the case may be, all the rights, powers and authority, discretionary or otherwise, given in and by said Will to the said John Gillies, as Trustee thereunder or Executor thereof, respectfully.

Second: I ratify and confirm my said Will in all other respects.

In Witness Whereof, I have hereunto set my hand and seal to this Codicil to my Last Will and Testament, this 13th day of October, A. D. 1922.

Charles H. Hulburd (Seal)

The foregoing instrument was on the 13th day of October, A. D. 1922, signed, sealed, published and declared by the said Charles H. Hulburd as and for a Codicil to his Last Will and Testament, in the presence of us, the undersigned, who have, at his request, in his presence, and in the presence of each other, subscribed our names hereto as witnesses this 13th day of October, A. D. 1922.

Alfred T. Carton, residing at Lake Forest, Ills.
W. J. Fitzsimmons, residing at Chicago, Ills.
Page D. Ballard, residing at Evanston, Ills.

[fol. 26] EXHIBIT "C" TO AMENDED PETITION

STATE OF ILLINOIS,
County of Cook, ss:

In the Probate Court of Cook County

In the Matter of The Estate of Charles H. Hulburd, Deceased

This day came Hugh McBirney Johnston and DeForest Hulburd, executors of the last will and testament of Charles

H. Hulburd, deceased, and presented to the court and filed herein their final account with the estate of said decedent, showing that said estate has been fully administered.

And it now appearing to the Court that more than one year has elapsed since the granting of letters testamentary herein; that due notice has been given to all of the heirs at law, legatees and beneficiaries; that all assets of said estate have been collected; that no claims have been filed against said estate; that specific legacies have been paid; that the inheritance tax, Federal estate tax, Income tax, court costs, and all other costs and expenses of administration herein have been paid, and that the balance of said estate has been distributed according to the last will and testament of said decedent, and guardian ad litem consenting to the approval of said final account.

It Is Therefore Ordered by the court that said final account be approved and recorded, that the estate be and it is declared settled and that the executors be and they are hereby discharged.

Dated, February 26, 1925.

Enter:

(Signed) Henry Horner, Judge.

[fol. 27] EXHIBIT "D" TO AMENDED PETITION

Re;IT:R:BGC:S.

April Sixteenth, 1926.

Commissioner of Internal Revenue,
Washington, D. C.

DEAR SIR:

Pursuant to your letter of April 14, 1924, to our attorneys, Messrs. Gardner and Carton, 76 West Monroe Street, Chicago, the undersigned, DeForest Hulburd and Hugh McBirney Johnston, as executors of the will of Charles H. Hulburd, deceased, hereby request that all taxes due on account of income received during the lifetime of said Charles H. Hulburd, deceased, who died January 14, 1924, be determined and assessed within one year, in accordance with the provisions of Section 250 (d) of the

Revenue Act of 1921. A certified copy of our letters testamentary is enclosed herewith.

Yours respectfully,

(Signed) DeForest Hulburd. (Signed) Hugh McBirney Johnston.

Encl.

EXHIBIT "E" TO AMENDED PETITION

Treasury Department, Washington

April 20, 1925.

IT:PA:1
FMA-106

Mr. DeForest Hulburd and Mr. Hugh McBirney Johnston, Executors, Estate of Charles H. Hulburd, % Gardner and Carton, 76 West Monroe Street, Chicago.

SIRS:

Reference is made to your letter dated April 16, 1924 in which you requested that this office determine and assess all taxes due on the income received by the above-named decedent during his life time in accordance with the provisions of Section 250 (d) of the Revenue Act of 1921.

[fol. 28] In reply you are advised that an examination of the returns filed by Charles H. Hulburd for the years 1919 to 1921 inclusive discloses no further adjustments necessary for these years.

The audit of the returns for 1922 and 1923, as made by the Supervising Internal Revenue Agent discloses deficiencies of $804.00 and $472.50 respectively.

The return filed for the period January 1, 1924 to January 14, 1924, the date of the taxpayer's death, has been audited in this office. The correct tax liability is found to be $4,319.68, none of which has been assessed.

You are advised that the deficiencies totalling $5,596.18 will be listed at once for assessment, and you will be furthe advised in a separate communication from this office.

Since the Revenue Act of 1924 is now in effect, the case has been closed under Section 277 (a) (3) of that Act.

Respectfully,

J. G. Bright, Deputy Commissioner, by (signed) A. Lewis, Head of Division.

BEFORE U. S. BOARD OF TAX APPEALS

ANSWER TO AMENDED PETITION.—Filed Feb. 1, 1929

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the amended petition of the above-named taxpayer, admits and denies as follows:

1. Admits the petitioners' residence as alleged and that they are the duly appointed executors of the last will and testament of Charles H. Hulburd, Deceased, as alleged in paragraph 1 of the amended petition.

2. Admits the allegations of paragraph 2 of the amended petition.

3. Admits the allegations of paragraph 3 of the amended petition.

4. Denies that the respondent erred as alleged in paragraphs 4 (a) to (l), inclusive, of the amended petition.

5. (c) Admits that the Van Sicklen Company, the tax-[fol. 29] payer corporation, was organized October 31, 1913, as alleged in the amended petition, and was engaged in the manufacture of speed recording and other devices and that it commenced business with an authorized capital stock of $150,000. Except as admitted herein, denies the allegations of paragraph 5 of the amended petition.

6. Denies generally and specifically each and every allegation contained in the taxpayer's amended petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the taxpayers' appeal be denied.

(Signed) C. M. Charest, C. M. Charest, General Counsel, Bureau of Internal Revenue. Of Counsel: R. W. Wilson, Special Attorney, Bureau of Internal Revenue.

BEFORE U. S. BOARD OF TAX APPEALS

MOTION TO AMEND ANSWER.—Filed Feb. 18, 1932

Comes now the respondent by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, and respectfully shows to the Board:

That the above-stated proceeding has been at issue since the 19th day of February, 1927, when an answer was filed by the respondent in conformity with the Board's Rules of Practice then in effect, and the case has since stood as at issue on the Calendar of the Board. That an Amended Petition was thereafter filed November 28, 1928, copy of which was served on the respondent December 4, 1928; and owner thereto was filed February 1, 1929.

Respondent now desires to amend the aforesaid Answer to Amended Petition to conform to the Revised Rules of Practice of the Board, promulgated under date of February 1, 1931, by adding thereto the following additional paragraphs setting up the grounds for affirmative relief on [fol. 30] which he relies, and praying for such relief as he may be entitled to, under the law, and the evidence to be adduced at the hearing.

Wherefore, it is prayed that the accompanying amendment be allowed.

(Signed) C. M. Charest, C. M. Charest, General Counsel, Bureau of Internal Revenue. Of Counsel: J. R. Johnston, Special Attorney, Bureau of Internal Revenue.

2/27/32.

(Stamp) Granted Feb. 27, 1932 (Signed) Logan Morris, Member U. S. Board of Tax Appeals.

BEFORE U. S. BOARD OF TAX APPEALS

AMENDMENT TO ANSWER TO AMENDED PETITION

Lodged Feb. 18, 1932

Comes now the respondent by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, and by leave of the Board, amends the Answer to Amended Petition heretofore filed in the above-stated proceeding by substituting and adding after paragraph two thereof the following paragraphs, and by adding the prayer for relief herein set forth in lieu of the prayer for relief in the aforesaid Answer to Amended Petition:

3. Admits that the taxes in controversy are income and profits taxes for the fiscal year ended September 30, 1919.

Admits that the Commissioner originally proposed to assess the Estate of Charles H. Hulburd, deceased, by virtue of the liability of said decedent as a transferee of the assets and property of the Van Sicklen Company, in the amount of $24,000.00.

4. Denies that error was committed in any respect as alleged in paragraph four of the Amended Petition and the various sub-paragraphs thereof.

5. Admits the following facts only which are alleged in paragraph five of the Amended Petition.

[fol. 31] (c) The Van Sicklen Company, the taxpayer corporation, was organized October 31, 1913, under the laws of the State of Illinois and was engaged in the manufacture of speed recording and other devices. It commenced business with an authorized capital stock of $150,000.00, $90,000.00 paid-in in property and the remainder in cash. On May 6, 1915 the authorized capital stock was increased to $250,000.00, the additional $100,000.00 being subscribed and paid for in cash. * * * That there was an accumulated deficit (without considering the profit in 1919 from the sale of its assets and business) of $93,568.95, but respondent does not have sufficient knowledge of the facts to admit that this deficit arose from operation of the business.

That a plan was perfected under which the entire assets of the old company (the Van Sicklen Company) were to be transferred, and were transferred, to a new company, (the Van Sicklen Speedometer Company), in return for 5,000 shares of its no par value capital stock, and $250,000.00 cash, which stock and cash were in turn to be divided, and were divided, among the stockholders of the old company. Each stockholder of the old company having a share of capital stock of $100.00 par value, received two shares of stock without par value in the new company. As a part of the plan of reorganization, the old corporation, (the Van Sicklen Company), passed out of existence and was shortly thereafetr dissolved.

The new corporation was called the Van Sicklen Speedometer Company and was incorporated July 25, 1919 under the laws of the State of Delaware with an authorized capital of 25,000 shares of no par value common stock.

* * * * * * *

On August 9, 1919, the Van Sicklen Speedometer Company exercised the option to purchase the Van Sicklen Company assets and to assume all liability and paid therefor the sum of $250,000.00 in cash and 5,000 shares of its no par value common stock.

* * * * * * *

Admits that the 5,000 shares of no par value common stock of the Van Sicklen Speedometer Company were received by the Van Sicklen Company for the purpose of distribution to its stockholders, but it is denied that said stock was without market value on August 9, 1919, the effective date of the contract.

Each and every allegation of fact in paragraph five of the Amended Petition not admitted above is denied.

[fol. 32] 6. Denies generally and specifically and every allegation in the Amended Petition, except paragraphs one and two thereof, not herein admitted, qualified or denied.

Further answering and as grounds for affirmative defense respondent says:

7. That heretofore, to-wit, under date of October 14, 1930, the Board promulgated its findings of fact and decision in this proceeding, upon a severance of the issues, as to whether or not the assessment of the liability asserted against the petitioner in this proceeding is barred by the statute of limitations. The findings of fact and decision of the Board in that proceeding are now pleaded in bar to any further redetermination or decision upon the matters of fact and questions of law therein found and decided.

8. That at all times material herein Charles H. Hulburd, petitioner's testator, was the owner of record of 240 shares of the capital stock of the Van Sicklen Company, a corporation under the laws of Illinois, as alleged by petitioner in paragraph five of the Amended Petition; and, upon the aforesaid sale of the assets and business of the Van Sicklen Company in the year 1919 became entitled to receive in liquidation of each share of said capital stock, $100.00 in cash and two shares of no-par value common stock of the aforesaid Van Sicklen Speedometer Company of the value of $100.00 per share. That there was paid and distributed to the said Charles H. Hulburd, in liquidation of his capital stock, $24,000.00 in cash and 160 shares of the no-par com-

mon stock of the Van Sicklen Speedometer Company of the value of $100.00 per share and there was distributed in the liquidation of the capital stock of said Charles E. Hulburd to each, E. A. Hamill and H. A. Ryerson, as assignees of said Charles H. Hulburd, 160 shares of the common no par value capital stock of the Van Sicklen Speedometer Company of the value of $100.00 per share, making, in all, cash in the sum of $24,000.00, and stock consisting of 480 shares of the value of $100.00 per share, distributed to the said Charles H. Hulburd, and/or to his assignees, in the liquidation of 240 shares of the capital stock of the Van Sicklen Company of which said Charles H. Hulburd was the owner of record at the time of the aforesaid distributions and up to the time of the dissolution of said corporation.

9. That the Van Sicklen Company, having disposed of all its assets and property, and having ceased to do business in the year 1919, as alleged by the petitioner in paragraph five of the Amended Petition, was, on the date on which the [fol. 33] "deficiency letter," or notice of liability, was mailed to petitioner, without any assets or property whatever.

10. That the taxes imposed upon the Van Sicklen Company, for which liability is asserted against the petitioner in this proceeding, were accrued at the time of the aforesaid distributions to petitioner's testator and/or to his said assignees, in the liquidation of the aforesaid capital stock of which the petitioner was the owner of record.

Wherefore, it is prayed:

(a) That the Board redetermine the amount of the deficiency in taxes due from the Van Sicklen Company for the taxable year or period involved, as shown by the "deficiency letter" attached to the petition in this proceeding, in the amount determined by the respondent, plus penalty and interest.

(b) That, in addition thereto, the Board determine the correct amount of additional deficiency, plus penalty and interest, arising from the facts herein alleged, to-wit, that the fair value in money or moneys worth of the aforesaid 5,000 shares of the no-par capital stock of the Van Sicklen Speedometer Company, at the time it was received, or was

due to be received, by the Van Sicklen Company was $100.00 per share, whereas the deficiency originally determined is based upon a value of but $30.00 per share for said stock.

(c) That the correct amount of the liability of this petitioner, under Section 280 of the Revenue Act of 1926, arising from the aforesaid transfers and distributions to Charles H. Hulburd, and/or to his assignees, be determined by the Board in the aforesaid amount of cash distributed to said Charles H. Hulburd, plus the fair value in money or moneys worth of the no-par value capital stock of the Van Sicklen Company distributed to him and/or his assignees, as hereinbefore alleged, in liquidation of the capital stock of the Van Sicklen Company of which said Charles H. Hulburd, was at all times the owner of record.

(d) That the respondent may have such other and further relief as he may be entitled to under the law and the evidence.

(Signed) C. M. Charest, C. M. Charest, General Counsel, Bureau of Internal Revenue. Of Counsel: J. R. Johnston, Special Attorney, Bureau of Internal Revenue.

JRJ:LS 2/17/32.

[fol. 34] BEFORE U. S. BOARD OF TAX APPEALS

PETITIONER'S REPLY TO RESPONDENT'S AMENDMENT TO ANSWER TO AMENDED PETITION

Filed at Hearing March 25, 1932

Comes now DeForest Hulburd, as sole surviving executor of the last will and testament of Charles H. Hulburd, Deceased, petitioner herein, by Alfred T. Carton and John E. Hughes, his attorneys, and files the following reply to respondent's amendment to his answer to the Amended Petition.

1. Answering paragraph 7 of the amendment to the said answer, the above named petitioner alleges that the Board has not rendered any final order or decision as in said para-

graph 7 alleged. An opinion has been rendered but no order has been entered upon the records of the Board.

2. Answering paragraph 8 of the amendment to the said answer, the above named petitioner alleges that while it is true that two hundred forty (240) shares of the capital stock of the Van Sicklen Company were issued, and remained standing on the books of said company, in the name of said Charles H. Hulburd, yet in truth and in fact said Charles H. Hulburd never had any beneficial interest in One hundred sixty (160) shares of said Two hundred forty (240) shares, but said One hundred sixty (160) shares were at all times material herein owned Eighty (80) shares thereof by one, Ernest A. Hamill, and Eighty (80) shares by one, Martin A. Ryerson; and said petitioner denies that upon the sale of the assets and business of the Van Sicklen Company in 1919 said Charles H. Hulburd became entitled to receive in liquidation of one One hundred sixty (160) shares any cash or stock whatsoever; and said petitioner also denies that there was paid or distributed to said Charles H. Hulburd in liquidation of said One hundred Sixty (160) shares of capital stock any cash or stock whatsoever.

Petitioner also denies that the stock of the Van Sicklen Speedometer Company had a value of $100 per share at the time of the distribution thereof.

3. Petitioner alleges that during the period of his administration of the estate of Charles H. Hulburd, deceased, in the Probate Court of Cook County, Illinois, and prior to [fol. 35] his discharge as said executor on February 26, 1925, he had no notice or knowledge of any indebtedness of said Charles H. Hulburd to the United States, or of any claim of the United States against said Charles H. Hulburd, arising from the distribution of the assets of the Van Sicklen Company.

4. Answering paragraph 10 of the amendment to the said answer, petitioner says that any penalties imposed upon the Van Sicklen Company were not accrued at the time of the alleged distribution to said Charles H. Hulburd, and he also avers that no penalties were imposed against said corporation prior to the dissolution thereof.

Alfred T. Carton, John E. Hughes, Counsel for Petitioners.

BEFORE U. S. BOARD OF TAX APPEALS

Statement of Evidence

Lodged Sep. 8, 1933

Filed Sep. 27, 1933

The following is a statement of the evidence in the above-entitled cause covering all the material evidence adduced at the hearings before the United States Board of Tax Appeals with reference to the issues involved.

This cause first came on for hearing before the Honorable H. F. Seawell, Member of the United States Board of Tax [fol. 36] Appeals, on April 23, 1930, pursuant to an order of the Board dated March 5, 1930, for a severance of the issues and for hearing, in the first instance, on the question of the statute of limitations. Following this hearing, the Board promulgated its interlocutory Findings of Fact and Opinion wherein it was held that the proposed assessment of deficiency in tax against the Estate of Charles E. Hulburd, deceased, was not barred by the statute of limitations, and it was so adjudged in said interlocutory decision.

Thereafter, on March 21, 1932, the cause came on for further hearing with respect to the remaining issues presented by the pleadings, before the Honorable John M. Sternhagen, Member of the United States Board of Tax Appeals, at Chicago, Illinois, pursuant to notice of hearing theretofore given. It was then agreed by the parties and the Member presiding that they would treat the record, findings of fact and decision, relating to the former hearing as a part of the record then to be considered, since there had been no final judgment entered, and it was then agreed that everything in the case up to the point of final judgment was in it for all purposes unless restricted by order of the Board.

At the first hearing, April 23, 1930, the following stipulation of facts was received in evidence:

STIPULATION OF FACTS

"It is hereby stipulated and agreed by and between the parties hereto, by and through their respective attorneys of record in local hearing before the Board of United States Tax Appeals, that the following facts are true, for the purpose of this proceeding, provided, however, that this stipula-

tion shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated.

"1. That the Van Sicklen Company of Elgin, Illinois filed its corporation income and profits tax return for the fiscal year as ended September 30, 1919, on December 31, 1919, with the Collector of Internal Revenue at Chicago, Illinois.

"2. That on November 17, 1924, the Commissioner of Internal Revenue duly and regularly assessed additional income and profits taxes against the Van Sicklen Company under the provisions of Section 274(d) of the Revenue Act of 1924, for the fiscal year ended September 30, 1919, in the sum of $227,872.06, and a penalty under the provisions of Section 250(d) of the Revenue Act of 1918, in the sum of $113,936.03, which assessment of additional taxes and pen- [fol. 37] alty has not been paid. That the Van Sicklen Company was duly and legally dissolved.

"3. That the notice of deficiency from which this appeal was taken was mailed on October 27, 1926.

"4. That on the 26th day of February, 1925, DeForest Hulburd and Hugh McBirney Johnston, executors of the last will and testament of Charles H. Hulburd, deceased, filed with the Clerk of the Probate Court of Cook County, Illinois their final account as such executors showing that said estate had been fully administered, and such proceedings were then and there had that said final account was approved and recorded and said executors discharged."

There was received as evidence for the petitioner before the Board, a certified copy of an order of the Probate Court of Cook County, Illinois, true copy of which is attached hereto and made a part hereof. (Pet. Ex. #3).

It was further stipulated as follows:

"It is further stipulated that on April 16, 1924, the executors of the Estate of Charles H. Hulburd addressed and mailed a letter (annexed to the petition) to the Commissioner of Internal Revenue, Washington, D. C., and the Commissioner replied thereto by letter dated April 20, 1925, copy of which is annexed to the original petition in this case."

Thereafter, at a further hearing at Chicago, Illinois, March 21, 1932, before the Honorable John M. Sternhagen, Member, further evidence was adduced as follows:

It was stipulated by counsel for the respective parties that the following facts stated by Mr. Johnston, counsel for the Commissioner in his opening statement were correct.

"As a matter of fact the material facts have been alleged by the petitioners in their amended petition which they filed some time after the original petition was filed, and in the replication which they have filed today. That is that the Van Sicklen Company was a corporation under the laws of Illinois, and that in the year 1919 a plan was evolved for the organization of a new company which was incorporated under the laws of Delaware, which was known as the Van Sicklen Speedometer Company. The Van Sicklen Company sold and transferred its entire assets and going business to the Van Sicklen Speedometer Company, which company agreed to assume its liabilities then appearing on its books. That it was a part of that contract that the Van Sicklen Company was to be dissolved; that the consideration in the [fol. 38] sale was $250,000 cash, which represented $100. per share for each share of stock in the Van Sicklen Company. The Van Sicklen Company had a total capital stock outstanding of $250,000, consisting of 2,500 shares, par value of $100. each. That in addition to the cash, there was issued 5,000 shares of common no-par value stock in the Van Sicklen Speedometer Company which represented two shares of the Van Sicklen Speedometer Company for every share owned in the Van Sicklen Company.

"That Charles H. Hulburd was the owner of record of 240 shares of the capital stock of the Van Sicklen Company, but 160 shares thereof were equitably owned by other parties. That in the distribution of the proceeds of sale a check was made to Mr. Hulburd in the amount of $24,000. and that he, in turn, paid to these other two equitable owners $8,000. each. That a stock certificate was issued first to the Van Sicklen Company for 5,000 shares of common no-par value stock of the Speedometer Company, rather 480 shares as affecting this particular case. Charles H. Hulburd was the owner of record of 240 shares; they made out one certificate for 480 shares first to the Van Sicklen Company; this certificate was endorsed by the pres-

ident of that company to Mr. Hulburd and a few days later, about five or six days later, it was turned back and three certificates were issued of 160 shares each to Mr. Hulburd and these two other parties, Mr. Ryerson and Mr. Hammel, I believe are the names of the two other parties."

The Member: "And that completed the distribution of all of the assets of the Van Sicklen Company?"

Mr. Johnston: "Yes."

The Member: "Did the Van Sicklen Company dissolve shortly thereafter?"

Mr. Johnston: "Yes, in September 1919."

The Member: "In the same year?"

Mr. Johnston: "Yes. This transaction was on August 9th. They had no assets thereafter.

"There are quite a number of these cases that are related, and I have entered into a stipulation with counsel for thirteen of the petitioners, that the Board may find deficiencies in the amount asserted by the Commissioner. Now the amount asserted by the Commissioner in all these cases gives no consideration to the stock, it simply considers the amount of cash which was distributed."

The Member: "Do you mean that the respondent has [fol. 39] measured the liability of each of the transferees of the Van Sicklen Company by the fact they received cash from the Van Sicklen Company and abandoned the liability by reason of the stock they received?"

Mr. Johnston: "Yes. In view of the fact that I have agreed that the Board might enter an order in these other cases on that basis, I feel we should not make fish of one and fowl of another. I feel that we should not contend otherwise in this case."

Thereupon there was received in evidence as Petitioner's Exhibit No. 1, a certified copy of the inventory of the Estate of Charles H. Hulburd, true copy of which is attached hereto and made a part hereof.

There was received in evidence as Petitioner's Exhibit No. 2 a certified copy of the final account of the Executors of the Estate of Charles H. Hulburd, true copy of which is attached hereto and made a part hereof.

There was received in evidence as Petitioner's Exhibit No. 3, a certified copy of an order of the Probate Court of Cook County, Illinois, dated February 25, 1925, true copy of which is attached hereto and made a part hereof.

Thereupon De Forest Hulburd, called as a witness for the petitioners, testified as follows:

That his address was Lake Forest, Illinois.

Q. "Were you one of the executors of the Estate of Charles H. Hulburd?"

A. "Yes, I was."

Witness further testified that he received in the mail a notice then handed to him dated October 27, 1926. That that was the first notice of any claim for taxes against this estate as an alleged transferee, which he received. Thereupon there was received in evidence as Petitioner's Exhibit No. 4 a copy of the sixty-day letter, true copy of which is attached to the petition which is a part of the transcript of the record in this case.

It was agreed by counsel for the respective parties that Hugh McBirney Johnston, one of the former executors and trustees under the will of Charles H. Hulburd, deceased, had departed this life since the filing of the original petition in this case with the Board of Tax Appeals.

[fol. 40] The foregoing evidence is all of the material evidence adduced at the hearing before the Board of Tax Appeals, and the name is approved by the undersigned, E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue, as attorney for the Commissioner of Internal Revenue.

(Signed) E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue.

Approved:

(Sgd.) John E. Hughes, Attorney for Respondent on Review.

Approved:

(Sgd.) J. M. Sternhagen, Member, United States Board of Tax Appeals. (S)

PETITIONER'S EXHIBIT 1

STATE OF ILLINOIS,
County of Cook, ss:

IN THE PROBATE COURT OF COOK COUNTY

No. 94909. Docket 228, page 82

In the Matter of the Estate of Charles H. Hulburd, Deceased

An Inventory of Said Estate

Item No.	Personal Property	
	Goods and Chattels:	
1.	Goods and chattels as per bill of appraisement herewith presented, appraised at	$6,410.
	Moneys on Hand and Deposited in Bank:	
2.	Cash on hand at date of death	198.
3.	Balance on deposit in Corn Exchange Bank of Chicago	14,117.74
4.	Balance on deposit in Illinois Merchants Trust Company, Chicago	5,038.75
[fol. 41]		
5.	Balance on deposit in Commercial Bank of Ocala, Florida	799.75
	Accounts Receivable:	
6.	Balance due from Elgin National Watch Company for salary (good)	1,666.67
	Notes Receivable:	
7.	Promissory note of Page D. Ballard dated October 2, 1923 (good)	500.
	Forward	$28,730.91

Item No.		Brought forward	$28,730.91
	Corporate Bonds (Good to the Extent Shown):		
8.	One City Club of Chicago First Mortgage Leasehold 5% Gold Bond, due April 1, 1941. Interest due May 1 and November 1. Coupons due May 1, 1924 and thereafter attached		
	Par Value	500.	
	Market value, at par		500.
9.	Three Chicago Railways Company Purchase Money 5% Gold Bonds, due February 1, 1927. Interest due January 1 and July 1. Coupons due July 1, 1924 and thereafter attached. Two bonds at $1,000 each, and one bond at $500.		
	Par value	2,500.	
	Market value at 45		1,125.
10.	Two Chicago Railways Company Adjustment Income 4% bonds, due February 1, 1927. Interest due May 1. Coupons due May 1, 1922 and thereafter attached. Two bonds at $100 each.		
	Par value	200.	
	Market value at 17		34.
[fol. 42]			
11.	Ten Chicago & Illinois Western Railroad Inc., General Mortgage 6% gold bonds, due 1947. Interest due July 1, 1924 and thereafter attached. Ten bonds at $1,000 each.		
	Par value	10,000.	
	Market value at 70		7,000.

Shares of Corporate Stock:

12. 9430 shares of the capital stock, of Elgin National Watch Company, an Illinois corporation. Par value $25. per share	235,750.
13. 3850 shares of the capital stock of Butler Brothers, an Illinois corporation. Par value $20 per share	77,000.
14. 500 shares of the capital stock of Illinois Merchants Trust Company, an Illinois corporation. Par value $100 per share	50,000.
15. 10 shares of the capital stock of the Corn Exchange National Bank of Chicago. Par value $100 per share	1,000.
16. 180 shares of the capital stock of Dolese & Shepard Company, an Illinois corporation. Par value $100 per share	18,000.
17. 50 shares of the capital stock of Chicago & Illinois Western Railroad Inc., an Illinois corporation. Par value $100 per share	5,000.
18. 1500 shares of the capital stock of Union Special Machine Company, an Illinois corporation. Par value $100 per share	150,000.
Forward	$574,139.91

[fol. 43]

Item No.	Brought Forward	$574,139.91
19. 1,000 shares Arkansas Diamond Corporation (desperate)		1.

Miscellaneous Securities:	
20. 20 shares in the University Auxilliary Association. Par value $100 per share	2,000.
21. 100 perferred shares in The Equitable Land Association of Chicago representing an investment of $10,000 as of April 1, 1899 with interest at 6% per annum on which $11,800 has been paid. (Doubtful)	1.
22. Certificate of Interest as holder of 300 shares of The Corn Exchange National Bank of Chicago, representing 300/30,000 of distribution in liquidation on which $15,000 has been paid. (Doubtful)	1.
23. Membership in the Chicago Board of Trade of the City of Chicago. Market value	3,300.
24. Member's Certificate of Interest in Shoreacres. Face value $1,000	1,000.
25. Four Founder's Certificates of Interest in Shoreacres. Face value $1,000 each. (Doubtful)	1.
26. Membership in South Shore Country Club. Market value	500.
Miscellaneous Personal Property:	
27. Interest as a partner in the firm of Hulburd, Warren & Chandler, Stock Brokers and Commission Merchants, 208 South La Salle Street, Chicago, Illinois. Cash value	104,796.28
28. Interest in Elgin National Watch Company's Pension Fund. Cash value	462.01

[fol. 44]

29.	Dividend from International Harvester Company due January 15, 1924		451.25
	Life insurance Policies on the the Life of Decedent. (Good to the extent shown):		
30.	Seven policies in Connecticut Mutual Life Insurance Co. Four policies for $10,000 each. One policy for $5000. One policy for $4,677. One policy for $323.		
	Face value	$50,000.	
	Less loans	30,550.	19,450.
31.	One policy in Northwestern Mutual Life Insurance Co.		
	Face value	$50,000.	
	Less loans	32,700.	17,300.
32.	Three policies in Mutual Benefit Life Insurance Co. One policy for $25,000. One policy for $15,000. One policy for $10,000.		
	Face value	$50,000.	
	Less loans	33,450.	16,550.
		Forward	$739,953.45

Item No.		Brought Forward	$739,953.45
	Life Insurance Policies on the Life of Decedent. (Good to the extent shown.) (Continued):		
33.	One policy in State Mutual Life Insurance Co. Face value $5,000		5,000.
34.	One policy in Phoenix Mutual Life Insurance Co.		
	Face value	$100,000.	
	Less loans	15,500.	84,500.

[fol. 45]

35. One policy in Massachusetts Mutual Life Insurance Co.		
Face value	$50,000.	
Less loans	9,400.	40,600.
36. One policy in Penn Mutual Life Insurance Co.		
Face value $50,000		50,000.
37. One policy in Berkshire Life Insurance Co. Face value $15,000		15,000.
38. Two policies in Metropolitain Life Insurance Co. One policy for $2,000. One policy for $5,000		7,000.
39. Interest in Board of Trade Mutual Benefit Association		2,492.42
Total Personal Property		$944,545.87

Real Estate

Legal description: That part of Lot twenty-nine (29) in the Subdivision of the South half (except the West one hundred and thirty-two and five-tenths (132-5/10) feet of said South half) of Original Block One (1) in the Canal Trustees' Subdivision of the South fractional quarter of Section Three (3), Township Thirty-nine (39) North, Range Fourteen (14) East of the Third Principal Meridian in Cook County, Illinois, as shown upon a corrected plat made by George P. A. Healy recorded in Book 18 of Plats page 28, bounded and described as follows, to-wit: commencing at the North East corner of said Lot twenty-nine (29) on the West line of the Lake Shore Drive; thence South Easterly along the West line of said Drive thirty-seven (37) feet eight and one-half (8½) inches, thence West on a line parallel with the North line of said Lot to a point Twelve (12) feet East of the East line of Lot twenty-eight (28) in said Subdivision by Healy; thence North on a line parallel with the West line of said Lot twenty-nine (29) to the North line of said Lot twenty-nine (29); thence East on the North line of said Lot twenty-nine (29) to the place of beginning;

Also that part of Lot Twenty-nine (29) aforesaid described as follows to-wit: commencing on the East line [fol. 46] of said Lot twenty-nine (29) thirty-seven (37) feet eight and one-half (8½) inches South Easterly of the North East corner thereof measured along the West line of the Lake Shore Drive; thence West on a line parallel to the North line of said Lot twenty-nine (29) to a point twelve (12) feet East of the East line of lot twenty-eight (28) in said Subdivision by Healy; thence North one (1) foot, more or less, to the South East corner of a tract of land conveyed to the City of Chicago for public alley purposes by Julian W. Mack and wife by deed dated June 4, 1901; thence West twelve (12) feet along the South line of said tract of land so conveyed to the City of Chicago to the East line of said Lot twenty-eight (28); thence South on the East line of said Lot twenty-eight (28) to the point of intersection of said Lot twenty-eight (28) by the North line of the South forty-nine (49) feet (measured on the Lake Shore Drive) of said Lot twenty-nine (29); thence East on the North line of said South forty-nine (49) feet (so measured) of said Lot twenty-nine (29) to a point on the West line of the Lake Shore Drive forty-nine (49) feet North Westerly of the South East corner of said Lot twenty-nine (29); thence Northerly along the West line of said Lake Shore Drive to the place of beginning;

Also all the right, title and interest of said Charles H. Hulburd, deceased, in and to all land and premises and the future accretions thereto and the riparian rights incident thereto, both presently and in the future being and lying East of the hereinbefore described parts of said Lot twenty-nine (29) and between the same and Lake Michigan.

Title by deed from Julian W. Mack and wife to Charles H. Hulburd, dated June 3, 1901, and recorded in the Recorder's office of Cook County, Illinois, on June 4, 1901 as document 3110530; by deed from Julian W. Mack and wife to Charles H. Hulburd, dated December 4, 1901 and recorded in said Recorder's office December 24, 1901 in Book 7577 of Records, page 333, as document 3188931; and by deed from Charles A. Plamondon and wife to Charles H. Hulburd, dated February 27, 1906 and recorded in said Recorder's office February 27, 1906 in Book 9422 of records, page 146, as document 3825155. Known as No. 1138 Lake Shore Drive, fronting 72 feet 2¼ inches on Lake Shore

Drive, but with a North and South width of 70 feet 5¼ inches.

Improved with a four story brick dwelling house, and occupied by Charles H. Hulburd, deceased, as a homestead.
[fol. 47] We, De Forest Hulburd and Hugh McBirney Johnston, as Executors of the last will and testament of Charles H. Hulburd, deceased, do hereby certify that the foregoing is a full and perfect inventory of all the estate of said deceased, real, personal, or the proceeds thereof, which has been committed to our superintendence and management, or has come to our hands, possession or knowledge.

(Signed) De Forest Hulburd, (Signed) Hugh McBirney Johnston, As Executors as aforesaid.

Approved in open Court April 30-1924.

Henry Horner, Probate Judge.

Clerk's Certificate

State of Illinois

(Seal of the State of Illinois)

County of Cook, ss:

I, Mitchell C. Robin, Clerk of the Probate Court of Cook County and the keeper of the records and files thereof, in the State aforesaid, do hereby certify the annexed and foregoing to be a true and correct copy of Inventory approved herein on the 30th day of April, A. D. 1924 in the matter of the estate of Charles H. Hulburd deceased as appears from the original on file and from the records of the Probate Court in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said Probate Court, at my office, in the City of Chicago, in said County, this 24th day of March, 1932.

Mitchell C. Robin, Clerk of the Probate Court.
(Seal.)

[Endorsed:] Probate Court of Cook County, Illinois. In the Matter of the Estate of —— ——. Mitchell C. Robin, Clerk.

[fol. 48] PETITIONER'S EXHIBIT 2

STATE OF ILLINOIS,
County of Cook, ss:

IN THE PROBATE COURT OF COOK COUNTY

In The Matter of the Estate of Charles E. Hulburd, Deceased

No. 94909
Docket 228, page 82.

Final Account

And now come De Forest Hulburd and Hugh McBirney Johnston, Executors of the last will and testament of Charles H. Hulburd, deceased, and present their Final Account as such Executors, wherein they charge themselves as follows:

Receipts

Inventory Item		
2.	Cash on hand at date of death	198.
3.	Cash on deposit Corn Exchange National Bank of Chicago	14,117.74
4.	Cash on deposit Illinois Merchants Trust Company, Chicago, and interest	5,052.31
5.	Cash on deposit Commercial Bank of Ocala, Florida	799.75
6.	Cash From Elgin National Watch Co.	1,666.67
7.	Cash from Page Ballard in part payment note	200.
11.	Cash from sale 10 Chicago & Illinois Western Railroad Inc. bonds	8,840.
13.	Cash from sale 25 share Elgin National Watch Co.	1,181.11
17.	Cash from sale 50 Shares Chicago & Illinois Western Railroad, Inc.	500.
	Forward	$32,555.58

[fol. 49]

Inventory Item		
	Brought Forward	$32,555.58
26.	Cash for membership in South Shore Country Club	518.33
23.	Cash from sale Chicago Board of Trade membership	3,300.
27.	Cash from Hulburd, Warren & Chandler in liquidation of partnership, with interest to March 6, 1924	103,614.14
24.	Cash for member's certificate Shoreacres	1,300.
28.	Cash from Elgin National Watch Company's Pension Fund	462.01
29.	Cash from International Harvester Co.	451.25
30.	Cash from Connecticut Mutual Life Insurance Co. on insurance policies	20,354.98
31.	Cash from Northwestern Mutual Life Insurance Co. on insurance policy	26,274.09
		188,830.38
32.	Cash from Mutual Benefit Life Insurance Co. on insurance policies	16,063.84
33.	Cash from State Mutual Life Insurance Co. on insurance policy	6,247.45
34.	Cash from Phœnix Mutual Life Insurance Co. on insurance policy	84,519.05
35.	Cash from Massachusetts Mutual Life Insurance Co. on insurance policy	41,606.13
36.	Cash from Penn Mutual Life Insurance Co. on insurance policy	50,578.
37.	Cash from Berkshire Life Insurance Co. on insurance policy	15,256.35

[fol. 50]

38.	Cash from Metropolitan Life Insurance Co. on insurance policies	7,000.
39.	Cash from Board of Trade Mutual Benefit Association	2,492.42
21.	Cash on account of liquidation of 100 preferred shares The Equitable Land Association of Chicago	2,750.

Inventory Item		
13. Cash dividends on 3850 shares capital stock Butler Brothers		12,031.25
12. Cash dividend on 25 shares Elgin National Watch Co.		12.50
Forward		$427,387.37
Brought Forward		$427,387.37
12. Cash dividends on 9405 shares Elgin National Watch Co.		$70,537.50
14-15. Cash dividend on 510 shares Illinois Merchants Trust Company (10 shares received in exchange for 10 shares Corn Exchange National Bank)		10,200.
20. Cash dividends on 20 shares The University Auxilliary Association		100.
8. Cash interest on City Club bond		25.
11. Cash interest on Chicago & Illinois Western Railroad, Inc., bonds		450.
		508,699.87
9. Cash interest on Chicago Railways Co. P. M. 5% bonds		125.
10. Cash interest on Chicago Railways Co. Adj. 4% bonds		24.
Cash return premiums on automobile, burglary and fire insurance		246.09
[fol. 51]		
Cash executor's fee Zerbrugg Estate		18.23
Cash refund federal estate tax Lois Culver Estate		224.72
Cash interest on account with Illinois Merchants Trust Company		268.01
Cash received on sale $50,000 U. S. certificates of indebtedness	$50,983.52	
Less cost of same	50,766.32	
Profit on investment	217.20	
Interest coupons cashed	1,093.75	
		1,310.95

Inventory Item			
	Cash interest on loan of $73,766 to De Forest Hulburd, March 6 to December 29, 1924		4,044.81
	Cash received in distribution from Hulburd, Warren & Chandler (in liquidation)	568.11	
	Less exchange on check	.05	
			568.06
	Total Cash Receipts		$515,529.74
	Brought Forward		$515,529.74
	Property and Securities Not Sold But Distributed Under the Will at Inventory Value:		
1.	Goods and chattels as per bill of appraisement	$6,410.	
9.	Three Chicago Railways Company Purchase Money 5% gold bonds, face value $2,500 at 45	1,125.	
10.	Two Chicago Railways Company Adjustment Income 4% bonds, face value $100 each, at 17	34.	
12.	9405 shares Elgin National Watch Co. at par	235,125.	
[fol. 52]			
13.	3850 shares Butler Brothers at par	77,000.	
14-15.	510 shares Illinois Merchants Trust Company (10 shares received in exchange for 10 shares Corn Exchange National Bank of Chicago) at par	51,000.	
16.	180 shares Dolese & Shepard Co. at par	18,000.	
18.	1500 shares Union Special Machine Co. at par	150,000.	

Inventory Item		
19. 1000 shares Arkansas Diamond Corporation	1.	
20. 20 shares University Auxiliary Association at par	2,000.	
21. 100 prefered shares The Equitable Land Assn. of Chicago	1.	
22. Certificate of interest representing 300/30,000 distribution in liquidation Corn Exchange National Bank	1.	
25. Four Founder's Certificates of Interest in Shoreacres	1.	
Forward	$540,698	$515,529.74
Brought Forward	$540,698.	$515,529.74
Property and Security Not Sold But Distributed Under the Will at an Agreed Valuation As Follows:		
7. Note of Page Ballard for $500 on which $200 has been paid, at	125.	
8. One City Club of Chicago First Mortgage Leasehold Gold Bond, face value $500, at	375.	
Total Value of Securities Received	$541,198.	541,198.
Total Receipts		$1,056,727.74

[fol. 53] And they crave credit and allowance as follows:

Voucher No.	Date 1934		
1.	Jan. 14.	Paid Chicago Examiner for death notice	4.50
2.	" 14.	Paid Chicago Tribune for death notice	7.50

Voucher No.	Date 1924		
3.	"	14.	Paid Chicago Evening Post for death notice ..... .75
4.	"	14.	Paid Chicago Journal for death notice ..... .75
5.	"	14.	Paid Chicago Daily News for death notice 2.75
6.	"	15.	Paid Fred Pamp for salary 87.50
7.	"	19.	Paid Otis Elevator Co. for elevator service ..... 25.
8.	"	21.	Paid Wm. Erby & Son for auto painting ..... 28.
9.	"	22.	Paid Fred Pamp for advances ..... 65.
10.	"	23.	Paid W. J. Fitzsimmons for incidental funeral and household expense ..... 43.
11.	"	28.	Paid Orpha Kendall Holstman for services at funeral ..... 125.
12.	"	30.	Paid Hulburd, Warren & Chandler for insurance 37.45
13.	"	31.	Paid Corn Exchange National Bank for interest 473.60
14.	"	31.	Paid Illinois Merchants Trust Co. for interest 473.61
15.	"	31.	Paid Oberlin Endowment & Building Fund on pledge ..... 1,000.
16.	Feb.	1.	Paid Carrie Silvander for salary Jan. 1, 1924 to Jan. 14, 1924 .... 40.
17.	"	1.	Paid Ellen Johnson for salary Jan. 1, 1924 to Jan. 14, 1924 .... 50.
18.	"	1.	Paid T. Sato for salary Jan 1, 1924 to Jan. 14, 1924, ... 50.
19.	"	1.	Paid Sam Peyton for Salary Jan. 1, 1924 to Jan. 14, 1924, ... 20.
20.	"	1.	Paid W. J. Fitzsimmons for January salary, ... 125.

[fol. 54]

21.	"	4.	Paid C. H. Jordan & Co., undertaker, ... 1,326.50
22.	"	5.	Paid Bowman Dairy Co. for milk, 11.88

Voucher No.	Date 1924		Brought Forward	
23.	Feb.	5.	Paid Marshall Field & Co. for supplies,	3.
24.	"	5.	Paid Dr. J. M. Washburn for services	25.
25.	"	5.	Paid Hutter's Market for meat	64.70
26.	"	5.	Paid Illinois Bell Telephone Co. for service	7.84
27.	"	5.	Paid Bennett & Lindgren for auto supplies	149.10
28.	"	5.	Paid Onwentsia Club for account	5.
29.	"	5.	Paid E. Wienhoeber & Co. for flowers	250.
30.	"	5.	Paid C. Lemke for account	.65
31.	"	6.	Paid Peoples Gas Light & Coke Co. for gas	9.63
32.	"	11.	Paid Morriss Grocery for groceries	11.37
33.	"	11.	Paid Commonwealth Edison Co. for light	8.29
34.	"	13.	Paid Spaulding & Co. for funeral cards	44.
35.	"	13.	Paid Pinkerton National Detective Agency for services	30.20
36.	"	15.	Paid Olson's Hand Laundry Co. for laundry	2.59
37.	"	25.	Paid Andrew R. Williams for notary fees	3.25
38.	"	27.	Paid Hulburd, Warren & Chandler for insurance	37.45
39.	"	28.	Paid Ellen Johnson for note and interest	848.
40.	"	29.	Paid Corn Exchange National Bank for interest	402.80
41.	"	29.	Paid Illinois Merchants Trust Co. for interest	402.78
[fol. 55]				
42.	"	29.	Paid W. J. Fitzsimmons for February salary	125.

Voucher No.	Date 1924			
43.	Mar.	5.	Paid P. J. Carr, County Collector 1923 personal property tax	621.75
44.	"	5.	Paid Thos. Helbing for rubber stamps	2.25
45.	"	5.	Paid Hulburd, Warren & Chandler for rubber stamps	2.
			Brought Forward	
46.	Mar.	7.	Paid Corn Exchange National Bank for note and interest	100,097.22
47.	"	7.	Paid Illinois Merchant Trust Co. for notes and interest	180,756.94
48.	"	7.	Paid Rev. J. G. K. McClure—services at funeral	50.
49.	"	7.	Paid Rev. T. A. Mills—services at funeral	25.
50.	"	11.	Paid Illinois Merchants Safe Deposit Co.—safety box rent	2.
51.	"	13.	Paid Morris G. Leonard, guardian at litem	25.
52.	"	13	Paid Clerk of Probate Court—costs	39.
53.	"	13.	Paid Clerk of Probate Court—costs	22.50
54.	"	13.	Paid Probate Court Reporters	15.
55.	"	13.	Paid Law Bulletin Publishing Co.	5.
56.	"	15.	Paid Collector of Internal Revenue for first installment 1923 federal income tax, (serial No. 306117)	11,446.52
57.	Apr.	1.	Paid W. J. Fitzsimmons for salary for March	125.
58.	"	2.	Paid Mae Thomas for stenography	25.
59.	"	16.	Paid P. J. Carr, County Collector for 1923, real estate tax	4,227.85
60.	"	17.	Paid South Shore Country Club for dues	32.50

[fol. 56]

Voucher No.	Date 1924		
61.	" 21.	Paid Hulburd, Warren & Chandler for revenue stamps on stock transfers	30.
62.	May 1.	Paid W. J. Fitzsimmons for April salary	125.
63.	" 1.	Paid Mae Thomas for stenography	10.
64.	" 27.	Paid Joseph A. Sparks for assessment against stockholders Van Sicklen Speedometer Co. as of August 31, 1919	240.
65.	June 2.	Paid W. J. Fitzsimmons for May salary	125.
66.	" 2.	Paid Mae Thomas for stenography	5.
67.	" 3.	Paid Hulburd, Warren & Chandler for insurance	88.20
68.	" 3.	Paid Graceland Cemetery Co. for care of lot	14.
69.	" 10.	Paid Illinois Merchants Safe Deposit Co. for box rent	8.

Voucher No.	Date 1924	Brought Forward	
70.	June 10.	Paid Collector of Internal Revenue for second installment 1922 federal income tax (serial No. 1165)	5,723.26
71.	" 11.	Paid Art Institute of Chicago on pledge	1,000.
72.	" 30.	Paid W. J. Fitzsimmons for June salary	125.
73	" 30.	Paid Mae Thomas for stenography	5.
74.	July 14.	Paid P. J. Carr, County Collector, for inheritance tax	68,204.05
75.	Aug. 1.	Paid W. J. Fitzsimmons for July salary	125.
76.	" 1.	Paid Mae Thomas for stenography	10.
77.	" 2.	Paid C. D. Summer for inheritance tax transcript	5.

[fol. 57]

Voucher No.	Date 1924		
78.	Aug. 2.	Paid Wm. R. Swissler, guardian ad litem	50.
79.	" 2.	Paid Chicago Inheritance Abstracting Co. for transcript	6.50
80.	" 2.	Paid Clerk of Probate Court—costs	5.
81.	" 2.	Paid Clerk of County Court—fee	10.
82.	Sept. 4.	Paid W. J. Fitzsimmons for August salary	125.
83	" 12.	Paid Collector of Internal Revenue for third installment 1923 federal income tax, (serial No. 717)	8,584.89
84.	Oct. 1.	Paid W. J. Fitzsimmons for September salary	125.
85.	Nov. 1.	Paid W. J. Fitzsimmons for October salary	125.
86.	Dec. 1.	Paid W. J. Fitzsimmons for November salary	125.
87.	" 12.	Paid Collector of Internal Revence for fourth installment 1923 federal income tax, (serial No. 290)	8,584.88
88.	" 19.	Paid Art Institute of Chicago final installment of pledge	1,000
89.	" 27.	Paid DeForest Hulburd for executor's fee	10,000.
90.	" 29.	Paid Ellen Johnson for note and interest	4,963.98
91.	" 29.	Paid Ellen Johnson for note and interest	2,600.00
92.	Dec. 29.	Paid Gall & Co. for headstone	150.
		Brought Forward	
93.	Dec. 29.	Paid Hulburd, Warren & Chandler for share of settlement with J. W. Sanderson, et al	2,701.58
94.	" 29.	Paid Hulburd, Warren & Chandler for interest	145.63
95.	" 29.	Paid Collector of Internal Revenue for federal estate tax	58,881.11

[fol. 58]

Voucher No.	Date 1924		
96.	" 31.	Paid W. J. Fitzsimmons for December salary	125.
	1925		
97.	Jan. 27.	Paid Hugh McBirney Johnston for executor's fee	10,000.
98.	" 27.	Paid W. J. Fitzsimmons for January salary	125.
99.	Feb. 18.	Paid Hulburd, Warren & Chandler for money advanced decedent	22.94
100.	" 18.	Paid Hulburd, Warren & Chandler for revenue stamps on stock transfers	80.64
101.	" 18.	Paid Gardner and Carton for attorneys' fees	10,000.00
102.	" 18.	Paid Department of Health for two death certificates	1.
103.	" 18.	Paid Clerk of County Court for recording inheritance tax receipt	.75
104.	" 18.	Paid Clerk of Probate Court for final costs	59.15
105.	" 18.	Paid W. J. Fitzsim[illegible]s for February salary	125.
106.	" 18.	Paid William France Anderson for guardian ad litem's fee	50.
107.	" 18.	Paid Collectors of Internal Revenue for decedent's federal income for year 1924	4,323.62
108.	" 18.	Paid County Collector as deposit for 1924 personal property tax	1,250.
		Total Cash Disbursements	$474,158.15

Distribution

Delivered to DeForest Hulburd in satisfaction of legacy under paragraph "Third" of will:	
Goods and chattels as per bill of appraisement and inventory	$6,410.

Delivered to Hugh McBirney Johnston, Trustee, in satisfaction of legacy under paragraph "Fourth" of will:		
[fol. 59] 1500 shares of the capital stock of Union Special Machine Company		150,000.
Delivered to DeForest Hulburd, being one-half residuary estate bequeathed to him under paragraph "Fifth" of will:		
Cash	20,685.79	
One Chicago Railways Company Purchase Money 5% gold bond, face value $1,000	450.	
One Chicago Railways Company Adjustment Income 4% bond, face value $100	17.	
One City Club of Chicago First Mortgage Leasehold gold bond, face value $500	375.	
4700 shares capital stock Elgin National Watch Co.	117,550.	
1925 shares capital stock Butler Brothers	38,500.	
255 shares capital stock Illinois Merchants Trust Co.	25,500.	
90 shares capital stock Dolese & Shepard Co.	9,000.	
500 shares capital stock Arkansas Diamond Corporation	.50	
10 shares University Auxiliary Assn.	1,000.	
50 shares The Equitable Land Assn. of Chicago	.50	
Certificate of interest representing 150/30000 distribution in liquidation Corn Exchange National Bank	.50	
Two Founder's Certificates of Interest in Shoreacres	.50	213,079.79

Delivered to Hugh McBirney Johnston and DeForest Hulburd, Trustees, being one-half residuary estate bequeathed to them as trustees under Paragraph "Sixth" of will: Cash	20,685.80	
Note of Page Ballard	125.	
[fol. 60] Two Chicago Railways Company Purchase Money 5% gold bonds, face value $1,500	675.	
One Chicago Railways Company Adjustment Income 4% bond, face value $100	17.	
Forward	21,502.80	369,489.79
Brought Forward	$21,502.80	$369,489.79
4703 shares capital stock Elgin National Watch Co.	117,575.	
1925 shares capital stock Butler Brothers	38,500.	
255 shares capital stock Illinois Merchants Trust Co.	25,500.	
90 shares capital stock Dolese & Shepard Co.	9,000.	
500 shares capital stock Arkansas Diamond Corporation	.50	
10 shares University Auxiliary Assn.	1,000.	
50 shares The Equitable Land Assn. of Chicago	.50	
Certificate of interest representing 150/30,000 distribution in liquidation Corn Exchange National Bank of Chicago	.50	
Two Founder's Certificates of Interest in Shoreacres	.50	213,079.80
Total Property, Cash and Securities Distributed		582,569.59

Recapitulation

Total Cash Received	515,529.74
Total Cash Disbursed	474,158.15
	41,371.59
Total Property and Securities Distributed	541,198.
	$582,569.59

Dated, Chicago, February 19, 1925.

The foregoing is a just, full, true and perfect account of [fol. 61] all moneys and properties received by said executors, and by them paid out and distributed.

(Signed) Hugh McBirney Johnston. (Signed) De Forest Hulburd, Executors of the Will of Charles Hulburd, Deceased.

State of Illinois,
County of Cook, ss:

Hugh McBirney Johnston and De Forest Hulburd, being each first duly sworn, each on oath deposes and says that he has read the foregoing account by them subscribed, and that the same is true in substance and in fact.

(Signed) Hugh McBirney Johnston. (Signed) De Forest Hulburd.

Subscribed and sworn to before me this 24 day of February, A. D. 1925.

(Signed) Alfred T. Carton, Notary Public. (Notarial Seal)

Approved, February 25, 1925.

(Signed) Wm. France Anderson, Guardian ad litem of Hulburd Johnston, Mary Elizabeth Johnston, Hugh McBirney Johnston, Jr. and Ethel DeForest Johnston, minor heirs of said decedent.

Approved in open Court Feby 26, 1925
Henry Horner, Probate Judge.

Final Report

And now come the said Hugh McBirney Johnston and De Forest Hulburd, Executors of the Will of Charles H. Hul-

burd, Deceased, and report to this Honorable Court that the foregoing is a just, full, true and perfect account of all moneyes and properties received by them as such executors and by them paid out and distributed; that the sole assets of said estate consisted of real estate and personal property as per the inventory heretofore filed herein and of the proceeds of sale and collection of personal property and the income thereof as above set out; that all said personal prop-
[fol. 62] erty has been reduced to possession by them as such executors and is accounted for by them above except a note of Page Ballard for an unpaid balance of Three hundred dollars ($300) and interest which has been distributed in kind at an agreed valuation of One hundred and Twenty five dollars ($125); that all federal estate taxes, Illinois inheritance taxes and federal income taxes assessed against said estate have been paid as per vouchers herewith presented, and that said executors have deposited the sum of Twelve hundred and fifty dollars ($1250) with the County Collector of Cook County for the payment of the personal property tax assessed against said estate for the year 1924; that no claims have been filed against said estate; that there has been no change in the heirship of said decedent from the table of heirship on file in said estate, and that Hulburd Johnston, Mary Elizabeth Johnston, Hugh McBirney Johnston, Jr., and Ethel DeForest Johnston, the minor heirs of the decedent, have been notified of this final accounting in accordance with the rules of this Court and that their duly appointed guardian ad-litem has endorsed his approval on the foregoing final account; that, as shown in said final account, said DeForest Hulburd, individually, has retained the goods and chattels of said estate bequeathed to him in paragraph "Third" of the decedent's last will and testament and one-half of the residuary estate bequeathed to him in paragraph "Fifth" of said will, and said Hugh McBirney Johnston, as trustee under said will, has retained the fifteen hundred (1500) shares of the capital stock of the Union Special Machine Company shown in said inventory and bequeathed to him as such trustee under paragraph "Fourth" of said will, and Hugh McBirney Johnston and DeForest Hulburd, as trustees under said will, have retained the remaining one-half of said residuary estate bequeathed to them as such trustees under paragraph "Sixth" of said will; and that the entire net personal estate of the decedent

has been distributed, as set forth in said final account and in accordance with the provisions of said will.

And said Hugh McBirney Johnston and DeForest Hulburd, as executors of the will of Charles H. Hulburd, deceased, pray that their foregoing final account and report be approved and ask to be discharged; all of which is respectfully submitted.

(Signed) Hugh McBirney Johnston, (Signed) DeForest Hulburd, Executors of the Last will and testament of Charles H. Hulburd, Deceased.

[fol. 63] State of Illinois,
County of Cook, ss:

Hugh McBirney Johnston and De Forest Hulburd, being each duly sworn, each on oath says that he has read the foregoing report by them subscribed and that the same is true in substance and in fact.

(Signed) Hugh McBirney Johnston, (Signed) De Forest Hulburd.

Subscribed and sworn to before me this 24 day of February, A. D. 1925. (Signed) Alfred T. Carton, Notary Public. (Notarial Seal.)

(Cut)

State of Illinois,
County of Cook, ss:

I, Mitchell C. Robin, Clerk of the Probate Court of Cook County and the keeper of the records and files thereof, in the State aforesaid, do hereby certify the annexed and foregoing to be a true and correct copy of final account and report approved herein on the 26 day of Feb'y A. D. 1925 in the matter of the estate of Charles H. Hulburd, deceased, as appears from the original on file and from the records of the Probate Court in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said Probate Court, at my office, in the City of Chicago, in said County, this 24th day of March, A. D. 1932.

Mitchell C. Robin, Clerk of the Probate Court. Court. (Seal.

Probate Court of Cook County, Illinois. In the Matter of the Estate of ——. ——, Attorneys. Mitchell C. Robin, Clerk.

[fol. 64] PETITIONER'S EXHIBIT 3

STATE OF ILLINOIS,
County of Cook, ss:

Be it remembered, That on the 26th day of February A. D. 1925, the same being one of the days of the February Term, 1925, of the Probate Court of Cook County, present thereat:

Honorable Henry Horner, Judge; Peter M. Hoffman, Sheriff; John F. Devine, Clerk.

The following, among other proceedings, were by and before said Court had, and entered of record, to-wit:

In the Matter of the Estate of Charles H. Hulburd, Deceased

This day came Hugh McBirney Johnston and De Forest Hulburd, executors of the last will and testament of Charles H. Hulburd, deceased, and presented to the court and filed herein their final account with the estate of said decedent, showing that said estate has been fully administered.

And it now appearing to the court that more than one year has elapsed since the granting of letters testamentay herein; that due notice has been given to all of the heirs at law, legatees and beneficiaries; that all assets of said estate have been collected; that no claims have been filed against said estate; that specific legacies have been paid; that the Inheritance tax, Federal estate tax, Income tax, court costs and all other costs and expenses of administration herein have been paid, and that the balance of said estate has been distributed according to the last will and testament of said decedent, and guardian ad litem consenting to the approval of said final account.

It is therefore ordered by the court that said final account be approved and recorded, that the estate be and it is declared settled and that the executors be and they are hereby discharged.

[fol. 65] STATE OF ILLINOIS,
County of Cook, ss:

I, John F. Devine, Clerk of the Probate Court of Cook County, in the State aforesaid, do hereby certify that the within is a true transcript of the proceedings had before said Court in the matter of the estate of Charles H. Hulburd, dec'd, entered herein on the 26 day of Feb'y, A. D. 1925.

In witness whereof, I have hereunto set my hand and affixed the seal of said Probate Court at Chicago, in said County, this 24th day of November, A. D. 1926.

John F. Devine, Clerk.

[Endorsed:] Probate Court of Cook County. Estate of Charles H. Hulburd, dec'd. Certified copy of proceedings and order of court. Entered Feb'y 26, 1925. John F. Devine, Clerk.

(Cut)

United States of America

STATE OF ILLINOIS,
County of Cook, ss:

I, John F. Devine, Clerk of the Probate Court of Cook County, and the keeper of the records and files thereof, in the State aforesaid, do hereby certify the annexed and foregoing to be a true and correct copy of Order of court entered herein on the 26 day of February, A. D. 1925, in the matter of the estate of Charles H. Hulburd, deceased, as appears from the original on file and from the records of the Probate Court in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said Probate Court, at my office in the City of Chicago, in said County, this 24th day of November, A. D. 1926.

John F. Devine, Clerk of the Probate Court. (Seal.)

[fol. 66] STATE OF ILLINOIS,
County of Cook, ss:

I, Henry Horner, Probate Judge of Cook County, and presiding as Judge of the Probate Court of Cook County,

in the State of Illinois, do hereby certify, that John F. Devine, Esq., whose name is subscribed to the foregoing certificate of attestation, now is and was at the time of signing and sealing the same, the Clerk of the Probate Court of Cook County, aforesaid, and keeper of the records, files and seal thereof, duly elected and qualified to office, and that full faith and credit are, and of right ought to be given to all his official acts as such, in all courts of record and elsewhere, and that his said attestation is in due form of law and by the proper officer.

Given under my hand and seal, at Chicago, in said Cook County, this 24th day of November, A. D. 1926.

Henry Horner, Probate Judge of Cook County, Illinois. (Seal.)

Clerk's Certificate of Judge's Certificate

United States of America

STATE OF ILLINOIS,
Cook County, ss:

I, John F. Devine, Clerk of the Probate Court of Cook County, in the State of Illinois (said Court being a Court of Record), do hereby certify that the Honrable Henry Horner, whose name is subscribed to the annexed and foregoing certificate: was, at the time of the signing thereof, and now is, the Probate Judge of said Cook County, and sole presiding Judge of said Probate Court, duly elected commissioned and qualified, and that his said signature is genuine.

In witness whereof, I have signed my name and affixed the seal of said Probate Court, at my office, in the City of Chicago, in said Cook County, this 24th day of November, 1926.

John F. Devine, Clerk.

Probate Court of Cook County, Illinois. In the Matter of the Estate of —— ——. —— ——, Attorneys. John F. Devine, Clerk.

[fol. 67] BEFORE U. S. BOARD OF TAX APPEALS

Findings of Fact and Opinion

Filed Oct. 14, 1930 (on Question of Statute of Limitations)

Promulgated October 14, 1930

In the circumstances of the instant case, held, the proposes assessment against the estate of Charles H. Hulburd, deceased, as a transferee of assets of the Van Sicklen Company is not barred by the statute of limitations provided by section 280 of the Revenue Act of 1926.

John E. Hughes, Esq., for the petitioners.

J. O. Rhyne, Esq., and J. A. Lyons, Esq., for the respondent.

The Commissioner has proposed an assessment against the estate of Charles H. Hulburd, deceased, of $24,000 as its liability as a transferee of assets of the Van Sicklen Company, representing unpaid income and profits taxes assessed against said company for the fiscal year ended September 30, 1919.

The issues in the case have been severed and the only question for the Board's decision now is whether the statute of limitations bars the proposed assessment. The case is submitted on the pleadings, depositions, stipulations and exhibits.

FINDINGS OF FACT

The petitioners, DeForest Hulburd and Hugh McBirney Johnston, are residents of Illinois, the former of Lake Forest and the latter of Chicago.

Charles H. Hulburd, a resident of Chicago, Ill., died January 14, 1924, leaving a will in which DeForest Hulburd and Hugh McBirney Johnston were nominated executors and trustees and on February 20, 1924, letters testamentary were issued to them by the Probate Court of Cook County, Illinois. Deforest Hulburd was also a legatee and devisee under said will.

The Van Sicklen Company of Elgin, Ill., filed its corporation income and profits tax return for the fiscal year ended September 30, 1919, on December 31, 1919, with the Collector of Internal Revenue at Chicago, Ill.

November 17, 1924, the Commissioner duly and regularly assessed additional income and profits taxes against the [fol. 68] Van Sicklen Company under the provisions of section 274 (d) of the Revenue Act of 1924 for the fiscal year ended September 30, 1919, in the sum of $227,872.06 and a penalty under the provisions of section 250 (b) of the Revenue Act of 1918, in the sum of $113,936.03, which assessment of taxes and penalty had not been paid. The Van Sicklen Company was duly and legally dissolved.

The notice of deficiency from which this proceeding arises was mailed October 27, 1926, addressed to "Estate of Charles H. Hulburd, c/o DeForest Hulburd, 86 East Randolph Street, Chicago, Ill."

April 16, 1924, the said executors mailed a letter to the Commissioner, requesting that all taxes due on account of income received during the lifetime of said Charles H. Hulburd, who died January 14, 1924, be determined and assessed within one year, in accordance with the provisions of section 250 (d) of the Revenue Act of 1921.

February 26, 1925, the said executors of the will of Charles H. Hulburd, deceased, filed with the clerk of the Probate Court of Cook County, Illinois, their final account as such executors, reciting that said estate had been fully administered, which account was thereupon approved and recorded and said executors discharged.

Deputy Commissioner Bright, on April 20, 1925, replied to the letter of April 16, 1924, of the said executors, stating that an examination of the returns filed by Charles H. Hulburd for the years 1919 to 1921, inclusive, disclosed no further adjustments necessary for such years. Information relative to the audit of said Charles H. Hulburd's tax returns for 1922, 1923, and for the period January 1, 1924, to January 14, 1924, date of his death, was also given to the effect that deficiencies totaling $5,596.18 would be at once listed for assessment. The executors were in the same letter further advised: "Since the Revenue Act of 1924 is now in effect, the case has been closed under section 277 (a) (3) of that Act."

Opinion

Seawell: The Van Sicklen Company filed its income and profits tax return for the fiscal year ended September 30, 1919, on December 31, 1919. The Commissioner, by vir-

tue of the Revenue Act of 1924, section 277 (a) (2), had five years after such return was filed within which to as- [fol. 69] sess income and excess-profits taxes against it for the fiscal year in question. He made the assessment against the company, as stated in our findings of fact, on November 17, 1924. By the same Revenue Act it is provided:

Sec. 280. If after the enactment of this Act the Commissioner determines that any assessment should be made in respect of any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such Act as amended, the amount which should be assessed (whether as deficiency or as interest, penalty, or other addition to the tax) shall be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand) as in the case of the taxes imposed by this title, except as otherwise provided in section 277.

Sec. 278. (d) Where the assessment of the tax is made within the period prescribed in section 277 or in this section, such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made.

The pertinent provisions of the Revenue Act of 1926 are as follows:

Sec 280. (a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including

interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title or by [fol. 70] any prior income, excess-profits, or war-profits tax Act.

(2) The liability of a fiduciary under section 3467 of the Revised Statutes in respect of the payment of any such tax from the estate of the taxpayer. Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax.

(b) The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows:

(1) Within one year after the expiration of the period of limitation for assessment against the taxpayer; or

(2) If the period of limitation for assessment against the taxpayer expired before the enactment of this Act but assessment against the taxpayer was made within such period,—then within six years after the making of such assessment against the taxpayer, but in no case later than one year after the enactment of this Act.

At the present stage of these proceedings and for the purpose of the only issue now being considered, we assume the correctness of the Commissioner's determination of the tax assessed against the Van Sicklen Company, a corporation.

In the instant case, the petitioners on April 16, 1924, mailed a written request to the Commissioner for the determination and assessment by him within one year of all taxes due on income received by the decedent during his lifetime. The request was made, as indicated therein, in accordance with the provisions of section 250 (d) of the Revenue Act of 1921. In view of the fact that no determination and assessment of any taxes were made against petitioners within one year after the giving of said notice or request, the statute of limitations is pleaded and relied on. We are of the opinion that said section is not applicable in the circumstances of the instant case.

The Commissioner is not proceeding to enforce collection of a tax or liability asserted under the Revenue Act of 1921 but under a later Revenue Act, 1926, which in some respects repeals, in others reenacts and in still others makes amendments to, prior revenue acts.

The deficiency in tax of the transferor which the Commissioner is now proposing to assess as a liability against the

estate of the decedent, of which the petitioners are executors, is a liability as a transferee of assets of the Van Sick-
[fol. 71] len Company and such liability is asserted under and by virtue of Section 280 of the Revenue Act of 1926, the provisions of which are given, supra.

Under section 280 (b) (2) of said Revenue Act, the Commissioner had one year from February 26, 1926, the date of its enactment, within which to assess the liability in the instant case. The deficiency notice was mailed to the "Estate of Charles H. Hulburd, c/o De Forest Hulburd," October 27, 1926, well within the time prescribed by said Act. The said section has been adjudged constitutional. Annie G. Phillips et al., Executors, v. Commissioner of Internal Revenue, 42 Fed. (2d) 177; Routzahn v. Tyroler, 36 Fed. (2d) 208.

If the decedent is in fact a transferee within the meaning of the statute quoted—which for the purpose of the present issue is assumed—his liability arose when he received assets of the Van Sicklen Company. Such liability, if any, existed prior to and apart from section 280 of the Revenue Act of 1926 but another new and different remedy than then existed was by said Act provided for enforcing such liability. This is made to appear clearly, in the report of the Senate Finance Committee, which had under consideration said section before its enactment. In said report (pp. 28, 29 and 30) it is stated:

> There are a number of situations in which the assets of the taxpayer have, subsequent to the accrual of his tax liability, been disposed of in whole or in part with the result that the Government can not successfully distrain or otherwise collect the full amount of the tax originally returned or found due as a deficiency.

A number of such instances are then given and the statement made:

> In most of the above cases it is probable that under existing law the Government may proceed in equity by suit against the transferee if the transferor no longer exists (that is, in the case of a corporation, is dissolved, or in the case of an individual, is dead), and if the liability of the transferor has not been judicially established by action against the taxpayer before dissolution or death.—Updike

v. United States, decided Circuit Court of Appeals, eighth circuit, December 1, 1925. * * * In all the above cases the transferee is not liable for the tax of the transferor, but is by reason of the receipt of the assets subject to an independent liability in his own person and payable out [fol. 72] of his own estate, arising under the trust fund doctrine or some similar theory.

Again there are a number of situations in which, without reference to any principle of the trust fund doctrine or similar theory, and independent liability arises in respect of a person other than the taxpayer by reason of failure to pay from the taxpayer's estate the tax due from the taxpayer. An example of this is section 3467, Revised Statutes, under which every executor, administrator, or assignee, or other person, who pays any debt due by the person or estate from whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person or estate for the debts due to the United States, or for so much thereof as may remain due and unpaid.

Under existing law proceedings for the enforcement of liabilities such as those heretofore discussed are solely by court proceedings. No proceedings before the board for the redetermination of a deficiency and for the ultimate enforcement by assessment and distraint may be had.

It is the purpose of the committee's amendment to provide for the enforcement of such liability to the Government by the procedure provided in the act for the enforcement of tax deficiencies. It is not proposed, however, to define or change existing liability. The section merely provides that if the liability of the transferee exists under other law then that liability is to be enforced according to the new procedure applicable to tax deficiencies. Thus, upon notice of the liability sent by registered mail, the transferee may make payment and bring claim and suit for refund or may with or without payment petition the board for redetermination with right to appeal to the higher courts. In either case the transferee has the opportunity to go before a court. * * *

The liability which arises in the transferee in respect of the receipt of the assets is normally to be measured by the liability of the transferor at the time of the transfer. This would include the amount of the tax due plus all interest,

additional amounts, and additions to the tax provided by law, up to the time of such transfer. • • •

See also United States v. Nelson B. Updike et al., 281 U. S. 489, in which Justice Sutherland passed on the defense [fol. 73] of the statute of limitations interposed in behalf of certain transferees under the 1926 Revenue Act. The issue there is not identical with the issue in the instant case but we are of the opinion that the same principles there proclaimed are applicable and that the statute of limitations is of no avail to the petitioners, provided the deficiency notice was properly "addressed," it having been sent by registered mail, October 27, 1926.

The petitioners contend that the respondent is precluded from making the proposed assessment because the deficiency notice was mailed after the estate of Charles H. Hulburd had been administered, the assets thereof distributed in accordance with the decree of the court having jurisdiction over the estate and the executors had been discharged. We have, heretofore, decided such question otherwise. See Karl J. Kaufmann, 15 B. T. A. 141; and Elna S. Evans, 12 B. T. A. 334.

Petitioners rely on the case of Nauts v. Clymer, 36 Fed. (2d) 207. The facts of that case are different from those of the instant case. In it the deficiency notice was mailed to L. C. Morgan, one of three former executors of the estate of one George H. Marsh, whose estate had been closed and said executors discharged at the time of mailing. The former executor receiving the notice took no action thereon and so far as the record discloses never informed his former co-executors that he had received any such notice. The decedent, Morgan, had on March 15, 1920, filed his 1919 income tax return and paid the tax shown therein to be due.

On April 3, 1925, a deficiency assessment was made against "George H. Marsh, deceased, L. C. Morgan, Executor, Van Wert, Ohio." The tax was not paid and on November 6, 1926, it was assessed against the appellee, as transferee, under the Revenue Act of February 26, 1926, who paid it under protest, filed claim for refund which was rejected and thereupon brought suit to recover the amount and obtained judgment in the District Court, which was affirmed in the Circuit Court of Appeals. While indicating the deficiency notice mailed appeared insufficient, having

been addressed to only one of three executors who had distributed the estate and been discharged, the Court rather emphasized the fact that limitation expired before the assessment of April 3, 1925.

In the instant case of deficiency notice was addressed to [fol. 74] the "Estate of Charles H. Hulburd, c/o DeForest Hulburd, 86 East Randolph Street, Chicago, Illinois."

It does not appear from the evidence that the petitioners, prior to the mailing of the deficiency notice involved herein, informed the Commissioner that they had been discharged as executors of the estate of Charles H. Hulburd, although they had previously advised him they were such executors.

The Revenue Acts of 1924 and 1926 do not prescribe how the deficiency notice shall be "addressed" but do prescribe and require that the "taxpayer" shall be notified of the deficiency "by registered mail."

In the instant case no claim is made that the notice of the deficiency was not sent by registered mail nor that the body or contents of the notice was not proper and sufficient but it is insisted that it was not properly addressed.

On this point petitioners cite Henry M. Day, 12 B. T. A. 161; Walter G. Morgan, 5 B. T. A. 1035; Utah Orpheum Co., 6 B. T. A. 343; and Wyoming Central Association, 8 B. T. A. 1064, in none of which was the question for decision the same as in the instant case. Those were cases in which the deficiency notices were sent to wrong cities or to wrong addresses in cities, thus preventing or delaying the receipt of such notices or where the notice itself was not a deficiency notice.

The purpose of the deficiency notice is to advise the persons liable for the payment of the tax that such deficiency exists. In the instant case the notice indicated that payment of the tax deficiency was expected from the estate of Charles H. Hulburd as a transferee of assets of the Van Sicklen Company. The notice was sent in the care of one of the executors (or who had been such) of said estate, to the proper street and address in Chicago to reach him. He recognized it was intended for the executors of the Charles H. Hulburd estate and evidently so informed the other former executor. Both accepted it as a tax deficiency notice intended for them and both individually and as executors and trustees under the will of Charles H. Hulburd, deceased, filed their petition herein.

In the circumstances of the instant case, we are of the opinion that the proposed assessment of deficiency in tax against the estate of Charles H. Hulburd, deceased, is not barred by the statute of limitations and it is so adjudged. This proceeding will be restored to the calendar for hearing on its merits in due course. Order will be entered accordingly.

[fol. 75] BEFORE U. S. BOARD OF TAX APPEALS

FINDINGS OF FACT AND OPINION—Filed April 7, 1933 (on Merits)

Promulgated April 7, 1933

1. The former estate of a decedent is not liable as a transferee or as the representative of a deceased transferee for the deficiency of a dissolved corporation after the bona fide discharge of the executors if the dissolution and liquidation of the corporation occurred long before the decedent's death and the executors had no notice of or claim for transferee liability before their discharge.

2. Semble that a notice to an estate of "its liability as a transferee" means that the estate and not the decedent has been determined by the Commissioner to be the transferee.

John E. Hughes, Esq., for the petitioners.

Arthur Carnduff, Esq., and J. R. Johnston, Esq., for the respondent.

OPINION

STERNHAGEN:

The respondent, having determined a deficiency and a penalty for the fiscal year ending September 30, 1919, in respect of the Van Sicklen Company, mailed a notice dated October 27, 1926, addressed to "Estate of Charles H. Hulburd, c/o DeForest Hulburd," as follows:

As provided by section 280 of the Revenue Act of 1926, there is proposed for assessment against the estate the sum of $24.000 constituting its liability as a transferee of the assets of the Van Sicklen Company, Elgin, Illinois, representing unpaid income and profits taxes assessed against

the company for the fiscal year ended September 30, 1919, in accordance with the attached statement, plus any penalty and accrued interest.

A petition was filed with the Board by DeForest Hulburd and Hugh McBirney Johnston, individually and as executors of and trustees under the will of Charles H. Hulburd, deceased, in which the petitioners assail the determination of the deficiency, of the penalty, and of the liability of the estate.

The respondent answered by a denial. After a hearing upon the issue whether the statute of limitations had barred the petitioners' liability, it was decided on October 14, 1930, that such liability was not barred. DeForest Hulburd, 21 B. T. A. 23. The proceeding is now submitted for [fol. 76] final decision after trial on the merits.

For the petitioners it is argued, first, that, assuming a proper determination as to the taxpayer corporation and a liability in respect thereof of the decedent as a transferee of the corporation's assets, there is no liability of the estate, because the estate was at no time such a transferee. This argument takes as its postulate a construction of the respondent's notice as one to the estate directly in its capacity as a recipient in its own behalf of assets for which in its own behalf it may be liable as a transferee. The respondent argues that he has not proceeded against the estate in that capacity, but in its capacity as a representative of the decedent, whereby any liability of the decedent is to be imputed to his estate.

There is nothing in the notice of liability which expressly indicates that the determination of the respondent was made in respect of the estate in its representative capacity. The language as above quoted does not mention the liability of the decedent as a transferee and does not indicate that the respondent treats the decedent as a transferee. The expression, "Constituting its liability as a transferee," would on its face convey the idea that the estate was determined to be a transferee and as such was liable. If, however, the language be regarded as ambiguous, the ambiguity is caused by the respondent, and should therefore be resolved adversely to him. To him it was well known that a decedent's estate has a dual existence before the tax law. By section 219, it stands as a taxpayer, in respect of income derived subsequent to the death of the decedent. A

dissolution and distribution by a corporation of which it is a shareholder occurring after the decedent's death may impose upon it directly a liability as a transferee of the corporation's assets. In such case, the language quoted would be apt. But the estate is also liable as the decedent's representative for tax upon income derived by him during his lifetime, and for his lifetime liability as a transferee, if properly demanded. This is not "its liability as a transferee," but it- liability as a representative of the transferee. It seems but natural for the executors or administrators of a decedent's estate, who perchance know nothing of the affairs of the decedent prior to his death, to treat the Commissioner's notice as meaning what it so clearly says, and not to assume an inadvertent use of language and seek for a possible correct meaning for a latent intent. It may not be forgotten that the letter of the executors of April 16, [fol. 77] 1924, requesting a promp- determination of decedent's taxes was, in the Board's earlier opinion, 21 B. T. A. 23, strictly construed against them so as to exclude application to the decedent's transferee liability and prevent a consequent release by limitation.

The evidence clearly establishes that the estate itself was not a transferee of the assets of the Van Sicklen Company. The corporation distributed its assets and was dissolved prior to decedent's death, and it does not appear that any part of such assets as were transferred by the corporation to him during his life were owned or possessed by him at the time of his death or in any way came into the hands of the executors of his estate.

But it is not satisfactory to rest the decision on a literal interpretation of the notice of deficiency. Hulburd, the decedent, was the owner in his own right of 80 shares of the Van Sicklen Company, and the respondent says that his share in the final distribution was $8,000. Assuming, arguendo, that it was, it does not follow that his estate is necessarily in this proceeding to be held liable as his representative as he would have been had he lived. The liquidation occurred in 1919, and Hulburd died in January, 1924, leaving a will. The executors were duly appointed, February 20, 1924. With reasonable promptness, on April 16, 1924, they requested the Commissioner in writing to determine the decedent's outstanding income taxes within a year (see section 250 (d), Revenue Act of 1921). Thus the

Commissioner was fully advised of Hulburd's death and of the pending administration of his estate and the opportunity for the presentation of claims against it. Although the executors' written request for a prompt determination of the decedent's income taxes did not refer to any liability he may have incurred as a transferee, nevertheless the Commissioner was thereby made aware of his right to enforce any such transferee liability by a claim against the estate before final distribution. No such claim was filed, although the deficiency and penalty of the Van Sicklen Company were assessed on November 17, 1924, while the estate was being administered. But an order of the probate judge, dated February 26, 1925, the estate was declared settled and the executors, having made final distribution and submitted their final account, were discharged. On April 20, 1925, the Commissioner replied to the executors' earlier request and stated that no further taxes were due for 1919 to 1921 and that there were deficiencies for 1922 to 1924. These were promptly paid and the Commissioner called the [fol. 78] case closed under section 277 (a) (3), Revenue Act of 1924. All this occurred before the enactment of any such provision as section 280, Revenue Act of 1926, providing the administrative remedy for transferee liability. On October 27, 1926, the notice of liability which has already been described was mailed to the estate.

We are of opinion that at the time the notice was mailed there was no liability of the estate or of the petitioners as executors. Both were at that time out of existence, and it would be an anomaly to recognize an existing transferee liability of a nonexisting transferee. Section 280 of the Revenue Act of 1926 did not create new liabilities, but only provided a new remedy for enforcing existing liabilities. Philips v. Commissioner, 283 U. S. 589. No authority is cited for giving it a retroactiove application as a remedy to enforce defunct liabilities or as reviving them. And, however possible it may be to find some retroactive effect in the statute under other circumstances, there is nothing in the present case to justify the belief either that Congress so intended or that it would produce a just result. With full knowledge of his opportunity and ample time within which to use it, the Commissioner took no step to present a claim, but permitted the estate to be closed and the executors discharged without knowledge of the possible liability. It is

not suggested that there were any circumstances indicating lack of good faith or diligence by the executors or that their representations to the probate court resulting in their discharge were disingenuous. If they were, there may still be a remedy for the Government to enforce personal liability of the executors under the Revised Statutes, section 3467. The respondent disclaims any attempt in this proceeding to invoke such a remedy. Section 281, Revenue Act of 1926, and section 312, Revenue Act of 1932, were not in effect during the existence of this estate, and imposed no duties upon the executors here. The decisions under those sections are therefore not pertinent. There is also a plain distinction between this case relating to transferee liability for another's tax and cases involving posthumous deficiencies in the decedent's own tax. Cf. Elna S. Evans, 12 B. T. A. 344; Karl J. Kaufmann, 15 B. T. A. 141; Elnora Haag, 19 B. T. A. 982; affd., 59 Fed. (2d) 516.

Whatever may be the liability of the decedent for his own tax deficiency, or the persistence of such liability at law against his estate and against the discharged executors who [fol. 79] failed to pay the deficiency before their discharge, there is a different question in equity after their bona fide discharge as to their liability for the tax of a corporation of which the decedent was a shareholder prior to its dissolution and liquidation which took place long before his death and of which they were during administration without actual or constructive notice.

We hold, therefore, that there was no liability of the estate as a transferee in its own behalf; and we hold also that in its representative capacity, the estate had no liability at the time of its determination by the respondent. We do not hold that there was no deficiency or penalty in respect of the Van Sicklen Company, and we do not hold that the decedent had no liability in respect thereof, or that the estate had no liability at any time. Nor do we say anything about the liability of any of the beneficiaries under the will or the distributees of the assets of the estate. See Lindley v. United States, 59 Fed. (2d) 336. Those questions are academic in this proceeding and need not therefore be decided.

Reviewed by the Board. Judgment will be entered for the petitioners.

BEFORE U. S. BOARD OF TAX APPEALS

JUDGMENT—Entered Apr. 12, 1933.

In accordance with the Board's report, promulgated April 7, 1933, it is

Ordered, adjudged and decided that there is no liability of the petitioners as transferees of the assets of the Van Sicklen Company in respect of any deficiency in that corporation's income and profits tax for the fiscal year ended September 30, 1919, or penalty, interest, or other addition thereto. Enter.

(Signed) John M. Sternhagen, Member. (Seal.)

[fol. 80] BEFORE U. S. BOARD OF TAX APPEALS

NOTICE OF FILING PETITION FOR REVIEW—Filed July 14, 1933

To John E. Hughes,
Attorney for Respondent on Review,
First National Bank Building,
Chicago, Illinois:

You are hereby notified that the Commissioner of Internal Revenue did, on the 7th day of July, 1933, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Seventh Circuit, of the decision of the Board heretofore rendered in the above entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 7th day of July, 1933.

(Signed) E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 10 day of July, 1933.

—— ——, Respondent on review. (Sgd.) John E. Hughes, Attorney for respondent on review.

BEFORE U. S. BOARD OF TAX APPEALS

NOTICE OF FILING PETITION FOR REVIEW—Filed July 14, 1933

To DeForest Hulburd,
86 East Randolph-Street,
Chicago, Illinois:
(Residence Lake Forest, Illinois:)

You are hereby notified that the Commissioner of Internal Revenue did, on the 7th day of July, 1933, file with [fol. 81] the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Seventh Circuit, of the decision of the Board heretofore rendered in the above entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 7th day of July, 1933.

(Signed) E. Barrett Prettyman, General Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 10 day of July, 1933.

(Sgd.) De Forest Hulburd, Respondent on Review.
—— ——, Attorney for Respondent on Review.

BEFORE U. S. BOARD OF TAX APPEALS

PETITION FOR REVIEW—Filed Jul. 7, 1933

Now comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorney, Hon. Pat Malloy, Assistant Attorney General, E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue, and J. R. Johnston, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I

The petitioner on review, (hereinafter referred to as the Commissioner), is the duly appointed, qualified and acting

Commissioner of Internal Revenue of the United States, appointed and holding his office by virtue of the laws of the United States. The respondents on review are the duly appointed and qualified executors and trustees, and the chief beneficiaries, under the last will and testament of Charles H. Hulburd, deceased, who died testate January 14, 1924, a resident of Chicago, Cook County, Illinois, leav- [fol. 82] ing an estate of realty and personalty. The Commissioner has heretofore determined that the respondents, as the executors and trustees under the will of said Charles H. Hulburd, deceased, are liable, as the personal representatives of his estate, at law and in equity, under Section 280 of the Revenue Act of 1926, for a deficiency in income and profits taxes imposed upon and assessed against the Van Sicklen Company, a corporation under the laws of Illinois, which, at all times material herein, had its principal office and agency and principal place of business at Elgin, Illinois, and made its returns for Federal income and profits taxes for the fiscal year ended September 30, 1919, to the Collector of Internal Revenue, Chicago, Illinois, all of which is within the jurisdiction of the United States Circuit Court of Appeals for the Seventh Circuit. Hugh McBirney Johnston has departed this life since the institution of this proceeding, leaving DeForest Hulburd, who resides at Lake Forest, Illinois, as the only surviving executor and trustee of said estate.

II

The matter in controversy involves the liability at law and in equity, under Section 280 of the Revenue Act of 1926, of the Estate of Charles H. Hulburd, of which both the petitioners were executors and trustees, and the chief beneficiaries, for taxes imposed upon and assessed against the Van Sicklen Company for the fiscal year ended September 30, 1919, in the amount of $227,872.06, and a penalty thereon, under Section 250(b) of the Revenue Act of 1918, in the amount of $113,936.03, which assessment of taxes and penalty has not been paid. The amount of the liability asserted by the Commissioner against these petitioners, as the personal representatives of the Estate of Charles H. Hulburd, is the sum of $8,000.00, with interest thereon at 6% from February 26, 1926, which liability arose from a

cash distribution in said amount, in the final liquidation of the Van Sicklen Company, made to Charles H. Hulburd, petitioner's téstator in the year 1919.

III

The Van Sicklen Company filed its corporation income and profits tax return for the fiscal year ended September 30, 1919, with the Collector of Internal Revenue, Chicago, [fol. 83] Illinois. On November 1, 1924, the Commissioner of Internal Revenue duly and regularly assessed additional income and profits taxes against said the Van Sicklen Company for the fiscal year ended September 30, 1919, in the amount of $227,872.06, and a penalty under the provisions of section 250(b) of the Revenue Act of 1918, in the amount of $113,936.03, which assessment of taxes and penalty has not been paid and is still outstanding.

Charles H. Hulburd was at all times material herein, prior to his decease, in January 1924, the owner of record of 240 shares of the capital stock of the said Van Sicklen Company, but 160 shares out of said 240 shares were equitably owned by two other individuals. In the year 1919, and prior to September 30, 1919 the Van Sicklen Company sold all of its assets and business to the Van Sicklen Speedometer Company, a corporation organized under the laws of Delaware, and received as consideration therefor $250,000.00 in cash, and 5,000 shares of the common stock of the Van Sicklen Speedometer Company without par value, representing $100.00 per share in cash, and two shares of the common stock of the Speedometer Company received for each of its 2,500 shares of capital stock outstanding. This cash and stock was all distributed to the stockholders of the Van Sicklen Company in proportion to stock owned of record. Each stockholder thereby received $100.00 in cash and two shares of no-par value common stock of the Speedometer Company in final liquidation of each share of the stock of the Van Sicklen Company then owned of record. The Van Sicklen Company was thus left without any assets or property whatever and was thereafter dissolved.

Charles H. Hulburd, in the year 1919, received from the aforesaid liquidating dividends, on the 240 shares of stock of the Van Sicklen Company, of which he was the owner of record, $24,000.00 in cash and 480 shares of the no-par value common stock of the Van Sicklen Speedometer Company.

By reason of the fact that two other individuals were the equitable owners of 160 shares of the said stock of the Van Sicklen Company, all of which stood in the name of Charles H. Hulburd, he, in turn, paid and delivered to them $16,000.00 in cash and 160 shares of the said no-par value stock of the Speedometer Company, leaving $8,000.00 in cash and 80 shares of no-par value Speedometer Company stock retained by Charles H. Hulburd, as his distributive share. [fol. 84] No proof was made in this proceeding of any market value for the no-par value stock of the Van Sicklen Speedometer Company.

The notice of liability (or of deficiency) from which the proceeding in this cause arose, was mailed October 27, 1926, addressed to "Estate of Charles H. Hulburd, c/o DeForest Hulburd, 86 East Randolph Street, Chicago, Illinois." DeForest Hulburd and Hugh McBirney Johnston, who were named as executors and trustees and who were the chief beneficiaries, under the will of Charles H. Hulburd, deceased, duly qualified as executors and for said estate, in the year 1924, following the death of Charles H. Hulburd on January 14, 1924. On or about December 21, 1926, "De Forest Hulburd and Hugh McBirney Johnston, Individually and as Executors of and Trustees under the Will of Charles H. Hulburd, Deceased," filed a petition with the United States Board of Tex Appeals, stating under oath that they were then executors and trustees under the will of said Charles H. Hulburd, deceased, and praying for a redetermination with respect to a liability asserted by the Commissioner against the Estate of Charles H. Hulburd, under section 280 of the Revenue Act of 1926, of which due notice had been given in the 60-day letter aforesaid mailed October 27, 1926, and addressed to "Estate of Charles H. Hulburd, 86 East Randolph Street, Chicago, Illinois." The United States Board of Tax Appeals, thereafter, upon the hearing of said petition, re-determined and entered its final order and decision to the effect that the petitioners in said proceeding were not liable because of the fact that they had on February 26, 1925, filed what was termed a final account in the Probate Court of Cook County, Illinois, reciting therein that the Estate of Charles H. Hilburd had been fully administered, which account was thereupon approved and recorded and said executors were ordered discharged as to the matter therein set forth.

IV

A review of said decision and final order of the Board of Tax Appeals, by the United States Circuit Court of Appeals for the Seventh Circuit is sought herein.

[fol. 85] V

The Commissioner says that manifest errors occurred and intervened to his prejudice in the record and proceedings before the Board of Tax Appeals, and in said decision and final order of redetermination rendered and entered by the Board, and the Commissioner assigns the following errors, and each of them, which he avers occurred in said record, proceeding, findings of fact, opinion, decision, and final order of redetermination, upon which he relies as grounds for reversing the said decision and final order of redetermination so rendered and entered by the Board of Tax Appeals, to wit:

1. The Board of Tax Appeals erred in not finding that the evidence all of the material facts in this petition set-out bearing upon the question of the liability of the petitioners in this proceeding, under Section 280 of the Revenue Act of 1926; and its findings of fact are without any evidence to support them and are at variance with the undisputed evidence in the case.

2. The Board of Tax Appeals erred in finding and determining that, on February 26, 1926, the date of the enactment of the Revenue Act of 1926, there was no enforcible liability at law or in equity against the Estate of Charles H. Hulburd, Deceased, and against the petitioners, DeForest Hulburd and Hugh McBirney Johnston, as Executors and Trustees under the will of Charles H. Hulburd, Deceased.

3. The Board of Tax Appeals erred in finding and determining that the Estate of Charles H. Hulburd, Deceased, and the petitioners, DeForest Hulburd and Hugh McBirney Johnston, Executors and Trustees under the will of said Charles H. Hulburd, Deceased, are not liable at law or in equity, under Section 280 of the Revenue Act of 1926, as transferees of the assets of the Van Sicklen Company, a corporation, to the extent of a distribution of $8,000.00 made to Charles H. Hulburd within his life time, in final liquidation of the Van Sicklen Company, plus interest thereon at 6% from February 26, 1926.

Wherefore, the Commissioner petitions that the decision of the United States Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Seventh Circuit, and that a transcript of the record, and statement [fol. 86] of the evidence, be prepared in accordance with law and the rules of said Court, and be transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

(Sgd.) Pat Malloy, Assistant Attorney General;
(Signed) E. Barrett Prettyman, E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue. Of Counsel: J. R. Johnston, Special Attorney, Bureau of Internal Revenue.

Duly sworn to by J. R. Johnston. Jurat omitted in printing.

[fol. 87] BEFORE U. S. BOARD OF TAX APPEALS

ORDER ENLARGING TIME

On motion of counsel for the petitioner, it is

Ordered: That the time for preparation of the evidence and transmission and delivery of the record sur petition for review of the above entitled proceeding by the United States Circuit Court of Appeals, Seventh Circuit, be and it is hereby extended to October 5, 1933.

(Signed) Logan Morris, Member.

Dated Washington, D. C., September 5, 1933.

Now, October 6 1933, the foregoing order enlarging time certified from the record as a true copy.

B. D. Gamble, Clerk, U. S. Board of Tax Appeals.

BEFORE U. S. BOARD OF TAX APPEALS

ORDER ENLARGING TIME

For cause appearing of record, it is

Ordered that the time for transmission and delivery of the record sur petition for review of the above entitled pro-

ceeding in the United States Circuit Court of Appeals for the Seventh Circuit be and it is hereby extended to October 14, 1933.

(Signed) Logan Morris, Member.

Dated Washington, D. C., October 2, 1933.

Now, October 6, 1933, the foregoing order enlarging time certified from the record as a true copy.

B. D. Gamble, Clerk, U. S. Board of Tax Appeals.
(Seal.)

[fol. 88] BEFORE U. S. BOARD OF TAX APPEALS

PRÆCIPE FOR RECORD

Filed Sep. 8, 1933

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, copies duly rectified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Seventh Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board.
2. Pleadings before the Board,

(a) Original petition filed in December, 1926.

(b) Amended petition filed on or about December 4, 1928, including annexed copy of deficiency letter, Exhibit A, thereto.

(c) Answer to amended petition, filed on or about February 1, 1929.

(d) Amendment to answer to amended petition, sent to the Board February 18, 1932.

(e) Motion to amend and order—

"Granted February 27, 1932 (signed) Logan Morris, Member, U. S. Board of Tax Appeals".

(f) Petitioner's reply to respondent's amendment to answer to amended petition, filed at the hearing, March 25, 1932.

3. Interlocutory decision, findings of fact and opinion, promulgated by the Board October 14, 1930.

4. Opinion and decision of the Board, promulgated April 7, 1933.

5. Petition for Review, together with proof of service of notice of filing petition for review, and of service of a copy of petition for review.

6. Statement of the evidence as settled and allowed.

7. Orders enlarging time for the preparation of the evidence and the transmission and delivery of the record.

8. This præcipe.

(Signed) E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue.

[fols. 89-92] Service of a copy of the within præcipe is hereby admitted this 8 day of September, 1933.

(Sgd.) John E. Hughes, Attorney for Respondent.

Clerks' Certificates to foregoing transcript omitted in printing.

[fols. 93-95] [Caption omitted.]

Appearances of counsel omitted in printing.

[fol. 96] In United States Circuit Court of Appeals, Seventh Circuit

5085

Commissioner of Internal Revenue

vs.

DeForest Hulburd and Hugh McBirney Johnston, Individually and as Executors of and Trustees under the Will of Charles H. Hulburd, Deceased

Petition for Review of Judgment of the United States Board of Tax Appeals

Order Setting Cause—October 2, 1934

It is ordered by the court that this cause be, and the same is hereby set down for hearing on October 16, 1934.

In United States Circuit Court of Appeals

[Title omitted]

Minute Entry—Oct. 16, 1934

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Miss Helen R. Carloss, counsel for Petitioner, and by Mr. John E. Hughes, counsel for Respondent, and the Court having heard the same, takes this matter under advisement.

[fol. 97] In United States Circuit Court of Appeals for the Seventh Circuit

No. 5085

October Term, 1934, January Session, 1935

Commissioner of Internal Revenue, Petitioner,

vs.

De Forest Hulburd and Hugh McBirney Johnston, Individually and as Executors of and Trustees under the Will of Charles H. Hulburd, Deceased, Respondents

Petition for Review of Decision of the United States Board of Tax Appeals

Opinion—Filed January 11, 1935

Before Evans, Sparks, and FitzHenry, Circuit Judges

Evans, Circuit Judge:

Charles H. Hulburd died January 14, 1924. De Forest, his son, and one Johnston, his son-in-law, since deceased, were executors of his will, to whom letters testamentary were issued by the Probate Court of Cook County on February 20, 1924.

The decedent was a stockholder in the Van Sicklen Company. This company was dissolved in September, 1919, and most of its assets were transferred to the Van Sicklen

Speedometer Company. The transfer was made without the Van Sicklen Company's paying all the income tax due the Government. On November 17, 1924, the Commissioner assessed additional income taxes for the fiscal year ending September 30, 1919. The amount of such taxes was $227,872.06 and the penalty, $113,936.03.

On this date the taxpayer had been long since dissolved, and its successor was unable to pay the tax. Payment was therefore sought of the various stockholders who had received part of the assets of the Van Sicklen Company in cash. As a stockholder decedent received $8,000 in cash [fol. 98] and stock in the new corporation on or about August 9, 1919. The present controversy revolves about the $8,000 cash payment which decedent received.

The Commissioner has attempted to fasten liability upon DeForest Hulburd either as executor of, or legatee named in the will of Charles H. Hulburd, deceased. He relies upon Sections 280 and 281 of the Revenue Act of 1926, which provide a liability on the part of a transferee of property of income taxpayers who have failed to pay their income taxes.

Sections 280 and 281, Revenue Act of 1926, are set forth in the margin.*

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* "Sec. 280. (a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

"(1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title or by any prior income, excess-profits, or war-profits tax Act.

* * * * * * *

"(b) The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows:

"(1) Within one year after the expiration of the period of limitation for assessment against the taxpayer; or

[fol. 99] The executors distributed the assets of the estate in accordance with the terms of the will. They filed their final account, which was approved by the Probate Court, and they were discharged on February 26, 1925.

"(2) If the period of limitation for assessment against the taxpayer expired before the enactment of this Act but assessment against the taxpayer was made within such period—then within six years after the making of such assessment against the taxpayer, but in no case later than one year after the enactment of this Act.

* * * * * * *

"(c) For the purposes of this section, if the taxpayer is deceased, or in the case of a corporation, has terminated its existence, the period of limitation for assessment against the taxpayer shall be the period that would be in effect had the death or termination of existence not occurred.

"(d) The running of the period of limitation upon the assessment of the liability of a transferee or fiduciary shall, after the mailing of the notice under subdivision (a) of section 274 to the transferee or fiduciary, be suspended for the period during which the Commissioner is prohibited from making the assessment in respect of the liability of the transferee or fiduciary, and for 60 days thereafter.

* * * * * * *

"(f) As used in this section, the term 'transferee' includes heir, legatee, devisee, and distributee." (U. S. C. A., Title 26, Sec. 1069.)

"Sec. 281 * * * (c) Notice under subdivision (a) or (b) shall be given in accordance with regulations prescribed by the Commissioner with the approval of the Secretary.

"(d) In the absence of any notice to the Commissioner under subdivision (a) or (b), notice under this title of a deficiency or other liability, if mailed to the taxpayer or other person subject to liability at his last known address, shall be sufficient for the purposes of this title even if such taxpayer or other person is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence." (U. S. C. A., Title 26, Sec. 1070.)

On April 16, 1924, respondents wrote a letter[1] to the Commissioner requesting that all income taxes due from decedent be assessed within a year. The Commissioner replied,[2] April 20, 1925, stating that there was no tax due for

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[1] April 16, 1924.

Commissioner of Internal Revenue,
Washington, D. C.

DEAR SIR:

Pursuant to your letter of April 14, 1924, to our attorneys, Messrs. Gardner and Carton, 76 West Monroe Street, Chicago, the undersigned, DeForest Hulburd and Hugh McBirney Johnston, as executors of the will of Charles H. Hulburd, deceased, hereby request that all taxes due on account of income received during the lifetime of said Charles H. Hulburd, deceased, who died January 14, 1924, be determined and assessed within one year, in accordance with the provisions of Section 250 (d) of the Revenue Act of 1921. A certified copy of our letters testamentary is enclosed herewith.

Yours Respectfully, (signed) DeForest Hulburd,
(signed) Hugh McBirney Johnston."

[2] Treasury Department

Washington

April 20, 1925.

Mr. DeForest Hulburd and Mr. Hugh McBirney Johnston,
Executors, Estate of Charles H. Hulburd, * * * Chicago.

SIRS:

Reference is made to your letter dated April 16, 1924 in which you requested that this office determine and assess all taxes due on the income received by the above-named decedent during his lifetime in accordance with the provisions of Section 250(d) of the Revenue Act of 1921.

In reply you are advised that an examination of the returns filed by Charles H. Hulburd for the years 1919 to 1921 inclusive discloses no further adjustments necessary for these years.

* * * * * * *

Since the Revenue Act of 1924 is now in effect, the case has been closed under Section 277(a) (3) of that Act.

Respectfully, J. G. Bright, Deputy Commissioner, By
(signed) A. Lewis, Head of Division.

certain years and that deficiencies were assessed for other years. The deficiencies thus determined were paid.

The Commissioner, on October 27, 1926, sent a deficiency [fol. 100] notice addressed to the estate of Charles H. Hulburd which was as follows:

"SIRS:

"As provided by Section 280 of the Revenue Act of 1926, there is proposed for assessment against the estate the sum of $24,000.00 constituting its liability as a transferee of the assets of the Van Sicklen Company, Elgin, Illinois, representing unpaid income and profits taxes assessed against the company for the fiscal year ended September 30, 1919, in accordance with the attached statement, plus any penalty and accrued interest."

Upon a showing that $16,000 of the $24,000 received by Charles H. Hulburd from the Van Sicklen Company was intended for and went to others, the Commissioner reduced his claim to $8,000.

The Board of Tax Appeals held the estate was not liable for such tax in as much as the estate was closed before the notice of deficiency was received and that a non-existent transferee could not be held liable for unpaid income taxes due from a transferor. The Board also held that the liability sought to be imposed upon the estate was that of a transferee and not that of a representative of a transferee and, in as much as the Van Sicklen Company made no transfer to the estate itself, or of moneys paid to the decedent which could be traced to the estate, there was no liability on the part of the estate for this tax. The Commissioner did not raise, and the Board did not pass upon, the question of liability of a legatee or beneficiary as a statutory transferee.

The Board rendered a separate opinion wherein it held the Commissioner's claim was not barred by any statute of limitations.

The liability here sought to be imposed, while closely associated with, must be distinguished from a liability for income tax. That there is a difference between the two is apparent from the fact that, in the absence of statute, it would be impossible to levy an income tax directly upon one who received property from a taxpayer who had not paid

his income tax, in an amount equal to the sum he received from the defaulting taxpayer.

The Commissioner's right, under the statute existing at the time, to levy the added deficiency tax against the Van Sicklen Company on the seventeenth day of November, 1924, is unchallenged. When Van Sicklen Company failed to [fol. 101] pay its income tax, decedent Hulburd became liable (to the extent of the $8,000) to the timely assessment of an $8,000 tax as a transferee. Concerning this assumption, we think there is, or at least should be, no legitimate controversy. True, there could also have been assessed a tax against the Van Sicklen Speedometer Company. But the right to assess one tax did not exclude the right to levy upon another.

Had Charles H. Hulburd not died he would therefore have been subject to the assessment of an $8,000 tax as a transferee of the defaulting income taxpayer, Van Sicklen Company. Such a liability would, of course, be subject to all the legal defenses available to any taxpayer such as the bar of the statute of limitations, as well as the defense that proper preliminary steps were not taken by the Commissioner. Whether it might also be barred by estoppel, we need not decide.

We think it also clear that deceased's liability survived his death, and his liability became the liability of his executors for the amount of the Commissioner's claim against deceased.

Respondents seek to avoid the tax assessment because: (1) The estate had been administered and the executors discharged after they had made the written request of the Commissioner as above described before any action was taken by Commissioner to assess the tax upon the transferee. (2) The Commissioner's claim was barred by the statute of limitations when the tax was assessed. (3) Neither respondent is liable as executor of the estate of Charles H. Hulburd or as a legatee named in his will.

As we view the case there are three questions, the answers to which determine liability. (a) Was the tax against the legatee barred by the statute of limitations or the action of the Commissioner before the tax was assessed or by the discharge of the executors and the distribution of the assets of the Charles H. Hulburd estate? (b) May a

tax assessed against a transferee levied within the time fixed by statute be enforced (1) against the legatee of said transferee in case the transferee died, or (2) against the executor of the will of said transferee in case the transferee died before the act authorizing the assessment of a tax against a transferee was passed? (c) If question (b) be answered in the affirmative, was the tax in this case properly and timely levied?

The petitioner failed to show identity of funds or other facts which would permit him to follow the $8,000 into the hands of the executors as a fund impressed with a trust. [fol. 102] He does not and can not, therefore, base his right to assess the tax on any trust fund theory other than that created and defined by the statute.

Although respondents won before the Board of Tax Appeals on other grounds, their first and chief contention in this court is that the Commissioner's claim was barred by statute when the tax in question was assessed. We agree with them that an adverse decision by the Board of Tax Appeals does not prevent their raising this same question here. Generally speaking, it is their contention that, because the executors in writing requested the Commissioner to determine all the income tax due against the decedent, within one year, and the Commissioner acted, this notice and this action by the Commissioner barred him from making further tax assessments. In other words Section 250, which gives to the executors or administrators of an estate the right to demand the determination of all income taxes against the estate within one year, is a short statute of limitations which bars further action by the Commissioner.

We fail to find anything in the letters that passed between the executors and the Commissioner which would prevent the latter from assessing the tax in question. Both referred to the income tax of decedent. Neither mentioned the assessment of a tax against the deceased as transferee.

That Section 250 (d) is limited to income tax and does not apply to taxes assessed against transferees is manifest from the first sentence of said section, "the amount of income tax * * due under any return made under this Act * * *." A transferee as such makes no return and the limitation of time is therefore directed to and limited by the return of an income taxpayer. Moreover, it would be giving to the statute a most unreasonable construction if the Com-

missioner were bound to include in his claim for taxes the sums which may be assessed against the decedent as a transferee. The Commissioner, of course, could not have known whether decedent was a transferee of a defaulting income taxpayer. In the case before us, he had no facts indicating such a situation. At the time, the statute which authorized the assessment of a tax against the transferee had not been enacted.

The requirement which necessitates determination of a tax by the Commissioner within one year from the date the executor makes written request therefor is reasonable, for the determination of the tax is based upon returns which give the necessary information to the Commissioner upon which he may make a correct assessment. All such fact requirements are absent in the case of the tax against a trans- [fol. 103] feree. With no return made by such transferee, and without information to the Commissioner concerning the existence of any liability as a transferee, respondents nevertheless argue that the Commissioner should be bound by his statement of income taxes due from the decedent, which was based upon income of decedent as shown by sworn returns made by the decedent.

The tax in question was assessed within the time permitted by the statute.

The original tax against the Van Sicklen Company was assessed within the statutory period, namely, on November 17, 1924. The proposal for assessment against the transferee was made within the time permitted by statute (Section 280 (b) (2)) namely, with one year of the date of the enactment of the Act. U. S. v. Updike, 281 U. S. 489. The notice was mailed October 27, 1926. The Act was passed February 26, 1926. The proposal of assessment was addressed to the Estate of Charles H. Hulburd, % DeForest Hulburd, 86 E. Randolph St., Chicago, Illinois. It was in fact received by the executors. The assessment was not actually made and could not be made until 60 days from October 27, 1926, the date of the notice of the proposed assessment. Section 274(a), Act of 1926. Respondents sought redress therefrom by petitioning the Board of Tax Appeals for a review of said proposal and for this period

of review before the Board of Tax Appeals and this court, the statute of limitations was tolled. It follows, therefore, that the claim is not barred by the statute.

Respondents' contention that the Commissioner is attempting to assess a tax against a transferee of a transferee instead of merely against the transferee, which was the extent of its power, is answered by Section 280 (3) (f), which reads:

"As used in this section, the term 'transferee' includes heir, legatee, devisee, and distributee."

As DeForest Hulburd received $4,000 of the $8,000 which his father received as transferee of Van Sicklen Company, we think, as to him, this section of the statute is conclusive. The property in the hands of the executors and which was distributed among the legatees (one-half of the residue going to the respondent Hulburd) was far in excess of the amount required to pay this $8,000 tax.

As to the executors, Section 281 (b) seems to be applicable.

"Upon notice to the Commissioner that any person is acting in a fiduciary capacity for a person subject to the liability specified in section 280, the fiduciary shall assume, on behalf of such person, the powers, rights, duties, and [fol. 104] privileges of such person under such section (except that the liability shall be collected from the estate of such person), until notice is given that the fiduciary capacity has terminated."

The subsection seems to require that the executors notify the Commissioner before their liability can be terminated. It likewise assumes, although it does not directly create, a liability on the part of the estate for the tax for which the deceased was liable at the time of his death. Petitioner is not, however, compelled to rely upon this section to establish liability of the executors for the tax in question. At the time Hulburd died, he was liable to be assessed for this tax. Upon his death his estate was equally liable. Upon the death of a transferee, his estate becomes liable for the tax to which the deceased transferee was subject. The estate was not the transferee of a transferee. The estate was the original transferee. A legatee of the deceased to

whom the estate was passed was also by Section 280 (3) (f) an original transferee.

We are also satisfied that the Act was intended to apply and does apply to taxes against a transferee, even though the unpaid income tax accrued prior to the passage of the Act and the transfer by the income taxpayer to the transferee was made prior to the passage of the Act.

Respondents finally argue that the notice which Commissioner sent to the estate of Charles H. Hulburd and which was received by the executors was insufficient to extend the statute of limitations. Their reliance is on Nauts v. Clymer, 36 F. (2d) 207, and Lieberman's Committee v. Commissioner, 54 F. (2d) 527. It is true that at the time such notice was received the estate of Charles H. Hulburd had been administered. The executors, however, had not notified the Commissioner of the termination of their status as executors.

We think the facts in the case of Nauts v. Clymer are distinguishable from those in the present case. Moreover, if the notice were insufficient, its insufficiency was waived by the executors' applying to the Board of Tax Appeals for review of it. This action naturally led the Commissioner to assume that the notice was sufficient and that he should take no further steps to notify of the proposed assessment of the tax. After taking this action, respondents are in a most embarrassing position to assert the contrary. We agree with the views expressed in Continental Products Co. v. Commissioner, 66 F. (2d) 434:

"• • • But the shorter and conclusive answer to the petitioner's contention is that such brazen repudiation by [fol. 105] a party of its own acts and assertions, on which the other party evidently relied, is not legally permissible."

It is finally argued that the Commissioner should have proceeded and exhausted all his remedies against the Van Sicklen Speedometer Company. There is certainly much of merit in the respondents' position that they should not be held liable for the tax of another if it be possible to collect a tax from the original debtor. On the other hand, if proceedings of this kind had been begun against the original taxpayer, the respondents could have pleaded the statute of limitations, although the delay was occasioned by

an effort to collect the tax from the original debtor. We must take the statute as it is. The Commissioner had the right to assess the tax against any transferee of a taxpayer who neglected to pay his taxes. Doubtless the transferee has a cause of action against the defaulting taxpayer. At any rate the transferee cannot contest the assessment of a tax due from him because as between him and another person said other person should pay it.

The Board of Tax Appeals assumed the correctness of the tax assessment against Van Sicklen Company. Respondents denied the existence of facts which showed such tax liability. The Board of Tax Appeals disposed of the question without determining this issue. It said:

"At the present stage of these proceedings and for the purpose of the only issue now being considered, we assume the correctness of the Commissioner's determination of the tax assessed against the Van Sicklen Company, a corporation."

In the absence of a determination of the correct amount of tax due from the Van Sicklen Company, it is impossible to finally dispose of this case. We can only reverse the order and direct that the Board ascertain the true amount of the tax against Van Sicklen Company. On that hearing we think the respondents may show, if such be the fact, that taxes have been paid by other transferees or by the Van Sicklen Speedometer Company, in which case the amount of such payments should be deducted from the tax which the Board assesses against the transferees of the Van Sicklen Company.

The order is therefore reversed with directions to proceed in accordance with the views expressed in this opinion.

[File endorsement omitted.]

[fol. 106] IN UNITED STATES CIRCUIT COURT OF APPEALS

Before Hon. Evan A. Evans, Circuit Judge; Hon. William M. Sparks, Circuit Judge; Hon. Louis FitzHenry, Circuit Judge.

5085

COMMISSIONER OF INTERNAL REVENUE

vs.

DEFOREST HULBURD and HUGH MCBIRNEY JOHNSTON, Individually and as Executors of and Trustees under the Will of Charles H. Hulburd, Deceased

Petition for Review of Decision of the United States Board of Tax Appeals

JUDGMENT—January 11, 1935

This cause came on to be heard on the transcript of the record from the United States Board of Tax Appeals, and was argued by counsel.

On Consideration Whereof: It is now here ordered and adjudged by this court that the Judgment of the said United States Board of Tax Appeals, entered in this cause on April 12, 1933, be, and the same is hereby reversed; and that this cause be, and the same is hereby remanded to the said United States Board of Tax Appeals with directions to proceed in accordance with the views expressed in the Opinion of this court.

MEMO. RE PETITION FOR REHEARING

And afterwards, to-wit: On the nineteenth day of January, 1935, there was filed in the office of the Clerk of this court, a Petition for a Rehearing, which said Petition for a Rehearing is not copied here.

[fols. 107 & 108] MEMO. RE ANSWER TO PETITION FOR REHEARING

And afterwards, to-wit: On the twelfth day of April, 1935, there was filed in the office of the Clerk of this court, an Answer to the Petition for a Rehearing, which said Answer is not copied here.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—April 15, 1935

It is ordered by the court that the Petition for a Rehearing in this cause be, and the same is hereby denied.

[fol. 109] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 110] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 3, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 39,565. U. S. Circuit Court of Appeals, Seventh Circuit. Term No. 39. De Forest Hulburd, Petitioner, vs. Commissioner of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed May 2, 1935. File No. 39 O. T. 1935.